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No. _____

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In The

Supreme Court of the United States

NEW HORIZON OF NEW YORK, LLC,

Petitioner,

VS:

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. REALTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of HOWARD ROSEN, M.D.; RUTH SCHARF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Does a district court's federal question jurisdiction over a claim for contempt of court permit it to exercise supplemental jurisdiction over pendent state law claims?

2. Does "related to" jurisdiction exist under 28 U.S.C. § 1334 when a complaint is filed in a bankruptcy adversary proceeding containing allegations, the resolution of which could have a considerable effect on a pending plan then being administered in the bankruptcy?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the United States Court of Appeals for the Fourth Circuit is contained in the caption of this Petition.

The Petitioner, New Horizon of New York LLC is a New York limited liability company. There is no parent or publicly held company owning 10% or more of the company's stock.

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Petitioner New Horizon of New York, LLC, respectfully requests that a writ of certiorari be issued to review the decisions of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published and is reported at 231 F.3d 143 (4th Cir. 2000), and contained in the Appendix hereto. In addition, the Fourth Circuit's order summarily reversing the related appeal concerning attorneys' fees in Case No. 00-1701, and the July 19, 1999 Order of the U.S. District Court for the Eastern District of North Carolina, are contained in the Appendix.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on November 2, 2000. The Fourth Circuit denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on November 28, 2000.

This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 401 provides that "a court of the United States shall have power to punish . . . contempt of its authority . . . ."

Title 28 U.S.C. § 1334(b) provides that "the district courts shall have original . . . jurisdiction of all civil proceedings . . . arising in or related to cases under Title 11."

Title 28 U.S.C. § 1367 provides that "the district courts shall have supplemental jurisdiction over all other claims that are . . . related to claims in the action within . . . original jurisdiction [and] form part of the same case or controversy under Article III."

STATEMENT OF THE CASE

This matter arises out of a consensual Chapter 11 bankruptcy plan of reorganization in which the Respondents/Defendants gained millions of dollars in benefits while sabotaging a valuable option benefit going to Petitioner/Plaintiff New Horizon of New York, LLC ("Horizon"). Defendants carried out the sabotage primarily by filing a baseless opposition to approval of an option contract in the United States Bankruptcy Court for the Eastern District of North Carolina, and followed that by taking and maintaining a frivolous appeal of the order granting approval of the option contract until Horizon's exclusive option to purchase valuable promissory notes expired. The evidence at trial demonstrated that the Defendants, acting individually and through their designated attorneys, secretly cooperated with each other in a series of subterfuges designed to mislead the bankruptcy court and the other parties involved in the bankruptcy, while assuring that the Defendants would receive their benefits under the plan of reorganization.

In the lawsuit below, Horizon contended that the Defendants' sabotage tortiously interfered with Horizon's contractual rights; constituted abuse of process; amounted to malicious prosecution; breached the bankruptcy plan of reorganization, a contract under law; violated the North Carolina Unfair or Deceptive Trade Practices Act ("UTPA"); and constituted civil contempt of the bankruptcy court's Confirmation Order.

After a three and one-half week trial, the jury returned a verdict finding Defendants liable on all counts submitted, and assessed compensatory damages of $6,491,835.00.[1] Punitive damages were also assessed against most Defendants, and the jury answered affirmatively a number of special interrogatories related to the UTPA claim. During the jury trial, the Senior District Judge for the Eastern District of North Carolina heard evidence on the civil contempt count. On July 19, 1999, the District Judge entered a final order and judgment awarding Horizon treble damages and attorneys' fees against all but two of the Defendants, for a total judgment of $22,292,102.70 While noting that the Defendants "may be deserving of punitive sanctions" for their "egregious" acts, the Court held against Horizon on its civil contempt claim (Order contained in the Appendix hereto). -

The Defendants appealed the jury verdict and the award of treble damages and attorneys' fees to the United States Court of Appeals for the Fourth Circuit. In an opinion issued November 2, 2000, New Horizon of NY LLC v. Jacobs, 231 F.3d 143 (4th Cir. 2000) (Opinion contained in the Appendix hereto), the Fourth Circuit vacated the judgment and remanded the matter to the district court for dismissal without prejudice for lack of federal subject matter jurisdiction. In a later order, the Fourth Circuit also summarily reversed the district court order awarding statutory attorneys' fees (Opinion contained in the Appendix hereto). Horizon filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 14, 2000. The court denied that Petition for Rehearing on November 28, 2000.

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[1] With pre-judgment interest, the compensatory damages amounted to $7,430,700.90.

FACTUAL SUMMARY

The following is a condensed recitation of the key facts proven at the trial below. These facts are important for the understanding of the two issues presented in this Petition - that is, federal jurisdiction based upon a substantial federal cause of action for contempt of court, and federal jurisdiction based upon matters "related to" a bankruptcy case.

AJ & AJ Servicing, Inc. ("AJ"), the debtor in the Chapter 11 proceeding below, was a New Jersey corporation previously controlled by Defendants Robert Jacobs, Alan Jacobs,[2] and Elliot Jacobs (together with Allan Mirwis, EJ Servicing, Inc., EJ Realty Management, Inc. and EJ Property Consultants, the "Jacobs Group"). Alan Jacobs is Robert Jacobs' brother. Elliott Jacobs is Robert Jacobs' son. Allan Mirwis is Robert Jacobs' brother-in-law.

In 1993, members of the Jacobs Group and AJ were found liable for fraud, and a judgment in the amount of $3,319,572 in compensatory damages and $350,000 in punitive damages was entered against them in Durham County, North Carolina, Superior Court, in favor of two New Jersey limited partnerships, New British Woods Associates ("NBW") and New Yorktown Associates ("NYA") (collectively, the "Partnerships").[3]

Later in 1993, a separate judgment issued in favor of Tudor Associates, Ltd. II, a Nebraska limited partnership ("Tudor"), by the United States District Court for the Eastern

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[2] Alan Jacobs was dismissed from this action during trial and was not a party to the appeal.

[3] Defendants Lane, Scharf, DaPuzzo, Rosen, Born, Queller, and David Queller, Inc. were limited partners of the Partnerships. They appeared as a group in the AJ bankruptcy proceedings and repeatedly identified themselves in their pleadings as the "Independent Limited Partners." They will be referred to herein as the "Independent Limited Partners" or the "ILPs."

District of North Carolina on a jury verdict against members of the Jacobs Group and AJ for compensatory and punitive damages totaling in excess of $7,000,000. The Fourth Circuit Court of Appeals affirmed the judgment. See Tudor Assoc., Ltd. II v. AJ & AJ Servicing, Inc., 36 F.3d 1094 (4th Cir. 1994) (unpublished opinion) (contained in the Appendix hereto).

Following entry of judgment in the 1993 proceedings against it, AJ filed for bankruptcy protection. Numerous contestants competed for AJ's assets, and after three years of negotiation, and the institution of no fewer than seven adversary proceedings, all parties in interest reached a settlement of all disputed claims in 1996. The terms of the settlement were memorialized in the September 26, 1996 Order of the United States Bankruptcy Court for the Eastern District of North Carolina (the "Confirmation Order"), confirming a consensual plan for reorganization of AJ. The Confirmation Order incorporated the terms of the negotiated settlement into the plan (hereinafter the "Confirmed Plan").

AJ's principal asset was a one-half interest in two promissory notes secured by apartment properties located in Durham County, North Carolina (hereinafter the "Notes"). Tudor, also in its own bankruptcy proceeding in the Eastern District of North Carolina, owned the remaining one-half interest in the Notes. The Confirmed Plan required AJ to assign its one-half interest in the Notes to Tudor, giving Tudor a 100% interest. Tudor would then extend the due date on the Notes, otherwise due on September 1, 1999, for 25 years, until 2025; Tudor also agreed to lift its prior declaration that the Notes were in default.

The Confirmed Plan also provided for Tudor to grant to the Sonnenschine Group or its designee, Horizon, an option to purchase the Note. The Sonnenschine Group had previously pursued the successful lawsuit in the names of the Partnerships resulting in the N.C. State Court judgment for fraud in the amount of $3,319,572 against AJ and the Jacobs

Group. This option would be separately approved through the Tudor bankruptcy proceeding, inasmuch as the Tudor partners and creditors needed to consent to the sale. All of the participants in the AJ bankruptcy consented to and were bound by the Plan.

The Confirmed Plan allocated three significant sets of benefits to the various participants:

1. The members of the Jacobs Group would have judgments against them canceled and vacated, relieving them of liability in excess of $11,000,000; in addition, various additional claims against them would be dropped, totaling in excess of $10,000,000.

2. Because of the 25-year extension of the Notes and the lifting of the default declaration, the limited partners of NBW and NYA (including the ILPs) would avoid federal income tax recapture for these tax shelter investments; the minimum estimated value of this tax savings was $10,000,000. Further, various other obligations of the Partnerships for legal fees and other expenses, amounting to over $2,000,000, were cut in half, and the Partnerships were guaranteed an annual cash flow of $75,000 for 25 years.

3. Horizon, as designee of the Sonnenschine Group,[4] was given the exclusive option to purchase the Notes for the favorable purchase price of $15.75 million. It was contemplated that commercial financing would be sought to fund the transaction. The evidence at trial demonstrated that the present-day net value of this purchase opportunity to Horizon amounted to $14,286,442.

Gerald Cohen, a New York attorney and long-time associate of Robert Jacobs, had been retained by and appeared on behalf of each of the ILPs in the AJ bankruptcy in early 1996. He had filed a number of pleadings on their behalf prior to the September 26, 1996 confirmation hearing. The ILPs knew, from the outset, that Jacobs and Cohen were collaborating; indeed, most of the ILPs retained Cohen at the suggestion of Jacobs.

Cohen came to Raleigh, North Carolina, for purposes of attending the confirmation hearing, but decided at the last minute to intentionally absent himself from the hearing so as to avoid being asked by the court whether he consented to the plan. He stated that he did this to "preserve the limited partners' future options."

On October 1, 1996, Cohen wrote to his ILP clients advising them of this conduct and telling them that as a result of the hearing and the Confirmed Plan, two "disaster[s]" occurred – that is, the ordering of the payment of legal fees

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[4] Horizon is a New York limited liability company, owned entirely by the eight children of Samuel Sonnenschine and Sherman Taub. Sonnenschine and Taub are the managers of Horizon, but have no ownership interest.

to the law firms of Tenzer Greenblatt and Moore & Van Allen, and the giving of an option to Samuel Sonnenschine to purchase the Notes. Cohen forwarded to his clients an additional letter dated September 24, 1996, which he had written to A.T. "Pete" Parsons, Jr. ("Parsons"), the general partner of the Partnerships, setting out his opposition to the option granted to Horizon. In that letter he stated in the final paragraph:

> My clients will expect me to do everything in my power to prevent you from giving Sonnenschine the ability to control the mortgage notes.

Thus, Cohen, for the ILPs, intentionally maintained his strategic silence, and while secretly harboring the intent and plan to fight the option, allowed the bankruptcy court to enter the Confirmation Order. Cohen concluded his October 1, letter to his clients as follows:

> Before I take any further action, I would like to have your input and approval to decide what the costs and risks of certain actions are as opposed to the possible consequences of simply doing nothing.

The ILPs were fully advised of their attorney's plan of action and were even solicited for their input and approval. They voiced no disagreement.

Robert Jacobs appeared at the September 26 hearing and personally consented to the plan, although he was strongly opposed to the option provision. E.D. Gaskins, as counsel for the entire Jacobs Group, also signed the Order, as did Malvern King, as counsel for the Partnerships.

On October 7, 1996, Cohen filed in the AJ bankruptcy on behalf of the ILPs a Notice of Appeal of the

Confirmation Order, purporting to appeal precisely the same two issues that were raised in his September 24 and October 1 letters – that is, payment of fees to the law firms and the granting of an exclusive option "to Samuel Sonnenschine to purchase the mortgage notes." Cohen testified that he prepared this Notice upon the recommendation and with the assistance of Gaskins and Albert Lawler (another attorney who represented the Jacobs Group). It was his regular practice to seek such guidance and consultation.

On October 9, 1996, Joseph Callaway, the Tudor Bankruptcy Trustee, wrote to Cohen demanding that he withdraw the appeal and threatening sanctions. Callaway stated:

> However, we are all aware that you are merely a puppet for the Jacobs interests. You have admitted to me that Mr. Lawler largely drafted the appeal.

Cohen did not deny these statements. Thus, within ten days of entry of the Confirmation Order to which the Jacobs Group had consented in open court, two of their lawyers (Lawler and Gaskins) were actively assisting Cohen in taking an appeal from the Confirmation Order. Because they had not yet received their own benefits from the plan (i.e., the cancellation of the judgments against them), [5] the Jacobs Group needed to sabotage the transaction covertly, using the ILPs as their allies.

Cohen testified that Callaway persuaded him that the appeal lacked merit and, on October 18, 1996, Cohen withdrew the ILPs' appeal in the AJ bankruptcy. Once the appeal was withdrawn, the Confirmation Order became final and binding on all parties. Thus, no one subject to the Order

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[5] The last judgment against the Jacobs Group was not canceled until December 6, 1996.

could thereafter permissibly object to the granting of the option to Horizon.

On November 1, 1996, Callaway filed a motion in the Tudor bankruptcy (as the Confirmed Plan contemplated) to obtain approval of the Option Agreement between Tudor and Horizon.[6] The ILPs, who were neither parties nor creditors in the Tudor bankruptcy and had never before filed any pleadings there, nonetheless purported to file an Opposition to Callaway's motion. Cohen acknowledged that he was provided with information and documents by Robert Jacobs that he used in this Opposition.[7] On November 19, Cohen wrote to Judge Leonard requesting that he reject the option to Horizon and stating that Cohen wished to appear at the November 25 Tudor hearing to argue and present testimonial evidence supporting his Opposition.

Cohen failed to show at the Tudor bankruptcy hearing, and no attorney appeared claiming to represent the ILPs. The Bankruptcy Judge noted that he had received the written opposition from Cohen, but that it was sent COD to the court, and was not signed by local counsel. The court rejected the filing. The Bankruptcy Judge approved the Option Agreement at the hearing and subsequently entered an order (the "Option Order").

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[6] Bankruptcy Judge J. Rich Leonard was the bankruptcy judge for both the AJ and Tudor cases.

[7] Cohen defined his purpose in filing the Opposition when he wrote to his ILP clients on November 29, 1996, forwarding a copy of the Opposition: "Enclosed please find a copy of a motion I filed to try to **stop Sonnenschine and Taub from being able to purchase the wrap around mortgage notes on the properties**. . . ." (emphasis added). The purpose, articulated first by Cohen on September 24, 1996, and continuing through the expiration of the option on January 15, 1997, was plain and simple: to prevent the sale of the Notes to Horizon.

On December 4, two days before the appeal period on the Option Order expired, Mr. Gaskins contacted Steve Beaman, a North Carolina attorney, and persuaded him to prepare and sign a Notice of Appeal of the Option Order, as local counsel for Cohen and the ILPs. This appeal, taken in the names of the ILPs, was filed on December 6, 1996. Cohen sent a copy of the Notice of Appeal, along with another explanatory letter, to his ILP clients on December 11.

The pendency of the appeal interfered with Horizon's efforts to obtain bank financing and title insurance necessary to close the sale. A scheduled closing of the option had to be postponed so as to allow the parties some additional time to try and work around the issues raised by the appeal. On December 20, 1996, by letter, as well as in additional telephone conversations, Callaway notified Cohen, Beaman, Gaskins and Lawler, that they were exposing themselves and their clients to liability for tortious interference with contract, as well as for treble damages for UTPA violations. He expressed his view that the appeal was filed in bad faith for purposes of interfering with the sale. Thus, all of the Defendants, through their designated counsel, were given explicit notice of the tortious nature of their conduct and the damages to which they were being exposed.

Throughout, Robert and Elliot Jacobs had personal interests in pursuing the purchase of the Notes for themselves and on behalf of another entity, Greystone, in which Robert Jacobs had a financial interest. While seeking to undermine the sale to Horizon, Jacobs and Cohen were simultaneously pressing Callaway and the bankruptcy court to sell the notes to Greystone. Indeed, during the exclusive option period, Greystone sent a November 20, 1996 letter to Callaway and Parsons, offering to purchase the Notes. Jacobs was a blind copy recipient of Greystone's letter, and the evidence at trial showed that Jacobs had actively solicited the letter from

Greystone so that its timing would correspond with the Opposition to be filed by Cohen. Beaman, the ILPs' local counsel, continued to dangle the prospect of a sale to Greystone before Callaway as late as January 14, 1997, when it finally became apparent that the option sale to Horizon could not close.

Meanwhile, the ILPs failed to timely file their Designation of Record and Issues on Appeal. Callaway filed a motion to dismiss the appeal and sought expedited consideration thereof. On January 3, 1997, the ILPs filed a Response opposing expedited consideration of Tudor's motion to dismiss, in a further attempt to keep the appeal alive. On January 16, 1997, one day after the Option's expiration, the district court dismissed the appeal, citing the untimely Designation of Record, and observing that the substantive arguments advanced in the motion to dismiss appeared to have merit.

Substantial evidence was presented at trial that the Horizon sale would have closed before the January 15 deadline but for the pending appeal. Once the Horizon option failed, the ILPs abandoned all pretense of pursuing their opposition to the wording of the Option Agreement, and no further appeal was taken from the dismissal by the district court.

Cohen and Jacobs were jubilant over their success in defeating the option. On February 5, 1997, Cohen wrote to his ILP clients trumpeting that "Sonnenschine lost his option and the $250,000 deposit he made for same." The very next day, on February 6, 1997, Robert Jacobs himself wrote to the ILPs, noting the "incredible job" that Gerald Cohen had done for them and suggesting to the ILPs that they forward $20,000 in fees to Cohen for his services rendered, to be paid according to a percentage breakdown that Jacobs conveniently attached to his letter. The ILPs paid the fees. There could be no clearer evidence of the unity of purpose and complicity of action between Jacobs and the ILPs.

Horizon filed this lawsuit on February 25, 1997, in the United States District Court for the Eastern District of North Carolina.[8] At the time of its filing, the AJ Plan of Reorganization was still pending, but lacked funding to carry out the necessary transfer of benefits to the various creditors of AJ. The exclusive option to Horizon had expired, and there were a number of potential contestants to purchase the promissory notes, including Horizon itself. In an effort to exclude Horizon as a purchaser of the notes, some or all of the Defendants were arguing each of the following points:

1. that the Defendants' consent to the Plan was obtained under duress;

2. that the Plan required an interpretation whereby the notes could only be sold with financing of no more than 77% of the cash flow of the underlying properties (which interpretation would exclude the financing contemplated by Horizon);

3. that Horizon's managers had unclean hands, which would prohibit Horizon from being a purchaser of the notes;

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[8] The case was subsequently transferred, upon motion of the defendants, to the United States Bankruptcy Court for the Eastern District of North Carolina, because the defendants contended that the case was "related to" the A.J. Bankruptcy. Ultimately, the case was transferred back to the District Court which conducted the jury trial as well as the contempt trial.

4. that Horizon could not be a permissible purchaser of the notes because a sale to Horizon would purportedly lead to federal income tax recapture for various Defendants;

and

5. that the conduct of the Defendants in undermining the Horizon option contained in the bankruptcy plan was not violative of the bankruptcy plan and, thus, did not constitute contempt of court.

Had the trial court ruled in Defendants' favor on any of the above-noted points, the result would have had a significant impact upon the pending A.J. plan of reorganization.

REASONS FOR GRANTING THE WRIT

In vacating the lower court's judgment in its entirety for lack of federal subject matter jurisdiction, the Fourth Circuit departed significantly from the holdings of several decisions of this Court regarding pendent jurisdiction and "related to" bankruptcy jurisdiction. In addition, the Fourth Circuit deviated from the clear meaning of several federal statutes providing for subject matter jurisdiction.

The question of subject matter jurisdiction has been deemed significant enough to warrant a grant of certiorari. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 8 (1951) ("as prompt, economical, and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts," grant of certiorari was appropriate). Jurisdiction is the cornerstone of federal jurisprudence. Where, as here, the petitioner has been

deprived of the federal forum for the full resolution of its claims, after a full merits trial, such an outcome is particularly egregious and unfair, warranting review and reversal by this Court.

I. HORIZON'S PETITION FOR CERTIORARI PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW REGARDING THE EXISTENCE OF FEDERAL QUESTION JURISDICTION UNDER 18 U.S.C. § 401, AND A FEDERAL DISTRICT COURT'S EXERCISE OF SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS IN SUCH AN ACTION.

A. The Fourth Circuit's Decision Is Inconsistent With The Plain Meaning Of 18 U.S.C. § 401.

Title 18 U.S.C. § 401 vests jurisdiction in the United States courts to enforce their own orders – "[a] court of the United States shall have power to punish . . . contempt of its authority, and none other . . . ." 18 U.S.C. § 401. The federal district court, therefore, had exclusive subject matter jurisdiction to determine the appropriate remedy for violation of the Confirmed Order, as the Order was issued by the bankruptcy court operating as a unit of the district court. See Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 133 (1995) (actions of bankruptcy court treated like actions of district court). The district court ultimately ruled against Horizon on the contempt of court claim, but only after a full trial and merits review of the claim. There can be no question that the district court possessed federal question subject matter jurisdiction to hear and decide the contempt claim.

B. The Fourth Circuit's Decision Is Inconsistent With The Supplemental Jurisdiction Statute And With This Court's Precedent Regarding Exercise Of Supplemental Jurisdiction Over Pendent State Law Claims.

Inasmuch as Horizon's federal contempt claim, on its face, was substantial enough to cause the district court to address its merits, the district court had discretion to exercise supplemental jurisdiction over the pendent state law claims deriving from a common nucleus of operative fact. 28 U.S.C. § 1367; United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). The Fourth Circuit's decision flies in the face of the clear holding of this Court in Rosado v. Wyman, 397 U.S. 397 (1970), where this Court highlighted the "common sense policy of pendent jurisdiction - the conservation of judicial energy and the avoidance of multiplicity of litigation" and held that the district court properly proceeded to exercise jurisdiction over pendent state law claims despite the fact that the federal claim had been dismissed. 397 U.S. at 404, 405.

Moreover, the Fourth Circuit's decision contravenes even its own prior precedent regarding federal jurisdiction over pendent state law claims. In Ridenour v. Andrews Federal Credit Union, 897 F.2d 715, 719-21 (4th Cir. 1990), the Fourth Circuit held that despite dismissal of the federal claim by the trial court, the trial court still had the discretion to retain jurisdiction over pendent state law claims. In that case, the federal cause of action was dismissed before trial, yet the Fourth Circuit upheld the discretion of the district court to retain pendent jurisdiction over state law claims. A similar result was endorsed in Shanaghan v. Cahill, 58 F.3d 106, 110, 112 (4th Cir. 1995), where the Fourth Circuit actually reversed the district court's dismissal of pendent state law claims and remanded the case with instruction to the district judge to

exercise discretion with regard to retention of the pendent state claims. The Fourth Circuit noted that the district judge had "wide latitude" in exercising this discretion and that the district court should consider, among other things, "the amount of time and energy that has already been expended" as well as "the interest of judicial economy." Id. at 110, 112. The Fourth Circuit inexplicably ignored this precedent in the case at hand and directed the dismissal of pendent state law claims, where the federal cause of action for contempt had survived numerous dispositive motions and was tried on its merits. This result flatly contravenes the well-established body of federal jurisprudence concerning pendent/supplemental jurisdiction.

II. HORIZON'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE "RELATED TO" JURISDICTION EXISTED UNDER 28 U.S.C. § 1334(b).

A. The Fourth Circuit Failed To Apply The Clear Wording Of 28 U.S.C. § 1334(b), Its Own Precedent, And The Holdings Of This Court.

28 U.S.C. § 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . arising in or related to cases under Title 11." In Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995), this Court articulated broad standards for "related to" jurisdiction in the bankruptcy court, particularly when dealing with a reorganization under Chapter 11. This Court expressed its agreement with the Third Circuit's decision in Pacor v. Higgins, 743 F.2d 984 (3d. Cir. 1984) that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate" and that the

"related to" language of Section 1334(b) must be read to give district courts jurisdiction over more than simple proceedings involving the property of the debtor or the estate. 514 U.S. at 308.

The issues raised in Horizon's Complaint concerning sale of the promissory notes (which were the primary asset of the AJ bankruptcy) and enforcement of the plan of reorganization of the bankruptcy court certainly involved the property of the debtor and, more importantly, called into question the interpretation and binding effect of the pending plan of reorganization. Defendants' contemporaneous contentions regarding the enforceability of the plan could have given rise to the following:

- a lower court's ruling that Horizon could not be a permissible purchaser of the notes because of purported concerns for income tax recapture;

- a lower court's ruling that a sale would be violative of the plan if it involved financing greater than 77% of cash flow for the properties;

- a lower court's ruling that the plan was void for duress or illegality.

Any of these rulings could and would have had a direct and substantive effect on the plan of reorganization which was then being administered. The effect of the Fourth Circuit decision is that issues such as these must be litigated in state court, while a bankruptcy plan is being administered in the bankruptcy court. Such a result not only defies common sense but would be entirely inconsistent with the wording of § 1334(b) and the interpretation of that statute by this Court. The district court correctly considered and appreciated these

circumstances and exercised its jurisdiction over the entire lawsuit. The Fourth Circuit erred.

The Fourth Circuit also ignored this Court's holding in Freeport McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428 (1991) that "if jurisdiction exists at the time an action is ***commenced***, such jurisdiction may not be divested by subsequent events," id. at 428 (emphasis added). The Fourth Circuit, itself, articulated a similar standard in In re Celotex Corp., 124 F.3d 619 (1997), where it stated that the test for "related to" jurisdiction was "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . ." The court went on to state that its analysis may not be informed by its knowledge of subsequent events, id. at 625, 626. Yet here the Fourth Circuit ignored these basic principles and considered events that occurred in connection with the AJ bankruptcy well after the commencement of this lawsuit in February, 1997, and, on that basis, divested the district court of subject matter jurisdiction. At page 20 of its opinion, for example, the Fourth Circuit stated that because the promissory notes were ultimately sold to a different purchaser in September, 1997, for a higher price than the Horizon option price, the Tudor and AJ estates ultimately realized a benefit, and there was, thus, no adverse effect on the bankruptcy plan.[9] Similarly, the panel noted at page 20 of its opinion that "the AJ estate was settled months before and unaffected by the trial in this case" – again, an analysis of events after the filing of the lawsuit. This retrospective analysis directly contravenes the holding in Freeport as well as the Fourth Circuit's own precedent.

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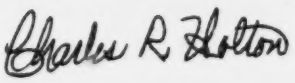
[9] The very suggestion of this fact highlights the error in the panel's analysis. What if the notes were sold in September 1997 for less than what Horizon was prepared to pay? Surely this would adversely impact the Tudor and AJ estates. Standing in February 1997 when the lawsuit was filed, this possibility was every bit as conceivable as what actually occurred.

CONCLUSION

This case presents significant questions of federal subject matter jurisdiction both with regard to supplemental/pendent jurisdiction over state law claims, and with regard to "related to" jurisdiction under 28 U.S.C. § 1334(b). The holding of the Fourth Circuit substantially conflicts with relevant decisions of this Court as well as precedent from the Fourth Circuit.

WHEREFORE, Petitioner New Horizon of New York, LLC, respectfully requests the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,



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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1990

NEW HORIZON OF NY LLC,

Plaintiff-Appellee,

v.

ROBERT JACOBS; ELLIOT JACOBS;
ALLAN MIRWIS; E. J. SERVICING, INCORPORATED;
E. J. REALTY MANAGEMENT CORPORATION;
E. J. PROPERTY CONSULTANTS; DAVID QUELLER;
DAVID QUELLER, INCORPORATED; IRA BORN,

Defendants-Appellants,

and

ALAN JACOBS[1]; STANLEY LANE, M.D.;
PETER DAPUZZO; CONSTANCE ROSEN,
Executrix of the Estate of Howard
Rosen, M.D.[2]; RUTH SCHARF,

Defendants.

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[1] Alan Jacobs was dismissed following trial and is not a party to this appeal.

[2] Dr. Rosen died during the pendency of the appeal and his personal representative has been substituted as a party.

No. 99-1996

NEW HORIZON OF NY LLC,
Plaintiff-Appellee,

v.

STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of Howard Rosen, M.D.; RUTH SCHARF,

Defendants-Appellants,

and

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E. J. SERVICING, INCORPORATED; E. J. REALTY MANAGEMENT CORPORATION; E. J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INCORPORATED; IRA BORN; ALAN JACOBS,

Defendants.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, Senior District Judge.
(CA-97-126-5-BR)

Argued: June 6, 2000
Decided: November 2, 2000
Entered: November 2, 2000

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Widener wrote the opinion, in which Judge Michael and Judge Motz joined.

COUNSEL

ARGUED: Nathan Lewin, MILLER, CASSIDY, LARROCA & LEWIN, L.L.P., Washington, D.C.; James G. Exum, Jr., SMITH, HELMS, MULLISS & MOORE, L.L.P., Raleigh, North Carolina, for Appellants. Charles Robert Holton, MOORE & VAN ALLEN, P.L.L.C., Durham, North Carolina, for Appellee. **ON BRIEF:** Paul F. Enzinna, Mark A. Miller, MILLER, CASSIDY, LARROCA & LEWIN, L.L.P., Washington, D.C.; Matthew W. Sawchak, Paul K. Sun, Jr., Julia F. Youngman, Allison K. Overbay, SMITH, HELMS, MULLISS & MOORE, L.L.P., Raleigh, North Carolina; Robert O. Jenkins, Phillip R. Miller, III, BLANCHARD, JENKINS & MILLER, P.A., Raleigh, North Carolina, for Appellants. Laura B. Luger, Pamela A. Wachter, MOORE & VAN ALLEN, P.L.L.C., Durham, North Carolina, for Appellee.

OPINION

WIDENER, Circuit Judge:

New Horizon of New York, L.L.C. (New Horizon) filed a six count complaint against fourteen defendants[1] in the United States District Court for the Eastern District of North Carolina. In its complaint, New Horizon alleged under state law that the defendants engaged in tortious interference of contractual relations, unfair and deceptive trade practices, breach of contract, malicious prosecution, and abuse of process; and, under federal law, civil contempt of court. On November 25, 1998, a jury found in favor of New Horizon on its state law claims and awarded New Horizon damages in excess of six million dollars. The district court conducted a bench trial on the civil contempt of court claim and on New Horizon's requests for trebled damages for the unfair and deceptive trade practice count, sanctions against the defendants, and attorneys' fees. On July 19, 1999, the district court denied New Horizon's request for relief on its civil contempt claim and denied the various motions for sanctions. The district court also denied the Jacobs Group defendants' and the Independent Limited Partners defendants' motions for judgment as a matter of law and for a new trial. The district court entered final judgment on July 26, 1999. The defendants appeal from that order. We vacate the judgment of the district court and remand the case to the district court to dismiss the action without prejudice for want of jurisdiction.

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[1] The defendants participating in the appeal are divided into two groups. Defendants Robert Jacobs, Elliott Jacobs, Allan Mirwis, E.J. Servicing, Inc., E.J. Realty Management Corp., E.J. Property Consultants, David Queller, David Queller, Inc., and Ira Born will be referred to as the Jacobs Group defendants. Defendants Drs. Stanley Lane and Howard Rosen, Peter Dapuzzo and Ruth Scharf will be referred to as the Independent Limited Partners defendants.

I.

The facts of this case involve two somewhat complex bankruptcy cases commenced in the Eastern District of North Carolina: In re Tudor Associates, Ltd. II, No. 77-BK-06-04, and In re AJ & AJ Servicing, Inc., No. 94-00135-8-JRL.[2] The Tudor bankruptcy began in 1977, and the AJ bankruptcy began in 1994. We recite only those facts pertinent to the instant controversy and relevant to this disposition.

The defendants in this case are the Jacobs Group and the Independent Limited Partners. The Jacobs Group consists of: Robert Jacobs and Elliot Jacobs, two of the owners of AJ & AJ Servicing Corporation (AJ); Allan Mirwis, who had been a general partner in New British Woods Associates (New British) and New Yorktown Associates (New Yorktown) and later became a limited partner of those partnerships; E.J. Servicing, Inc., E.J. Realty Management, Inc. and E.J. Property Consultants (collectively, the E.J. companies), controlled by Robert Jacobs and Elliott Jacobs; Ira Born, a limited partner in New British and New Yorktown; David Queller; and David Queller, Inc. The Independent Limited Partners are Dr. Lane, a cancer surgeon; Dr. Rosen, an orthopedist; Peter DaPuzzo, a managing director of a brokerage firm; and Ruth Scharf, a retired businesswoman; all of whom were limited partners in the two limited partnerships, New British and New Yorktown. New British and New Yorktown also consisted of 15 other limited partners associated with Sam Sonnenschine (the Sonnenschine Group). New British and New Yorktown owned income producing properties in Durham, North Carolina encumbered by what are called wraparound

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[2] The two bankruptcy cases will be referred to as the Tudor bankruptcy and the AJ bankruptcy throughout this opinion.

promissory notes and deeds of trust (wrap notes).[3] The Independent Limited Partners invested in New British and New Yorktown to receive tax benefits.[4] The underlying problem in this case involves the wrap notes and an option to purchase those wrap notes.

Tudor filed its petition for Chapter 12 bankruptcy in 1977. In the course of the Tudor bankruptcy, AJ, the servicer of the wrap notes, acquired one half of the cash net flow from the wrap notes.[5] At the time it acquired the wrap notes, AJ had not filed its petition in bankruptcy. By 1988, Tudor owned the other half of the interest in the wrap notes after various transactions. In 1993, Tudor and the owners[6] of the income producing properties won separate judgments in excess of ten million dollars against AJ, Robert Jacobs, and Elliott Jacobs based on AJ's fraud and mismanagement in the servicing of the wrap notes. Following the entry of those judgments against it, AJ filed for Chapter 11 bankruptcy protection. Both the Tudor bankruptcy and the AJ bankruptcy were pending before the same bankruptcy judge in the Eastern District of North Carolina.

In September 1996, after three years of negotiations, all of the interested parties in the AJ bankruptcy entered into

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[3] The mortgages were called "wrap note" mortgages because they required payments to be made to a lender who, in turn, paid the holder of the first mortgage. The "last lender wraps around the original debt," according to one of the bankruptcy Trustees.

[4] According to the Independent Limited Partners, if the wrap notes were paid off or foreclosed upon, or if they matured as scheduled, the Independent Limited Partners would suffer recapture of the original tax advantage, which is not otherwise explained.

[5] Prior to the confirmation of AJ's plan in bankruptcy, the Jacobs Group defendants controlled AJ.

[6] The Limited Partners defendants were limited partners in New British Woods and New Yorktown, along with other limited partners who are not defendants in this present case.

a global settlement (the Confirmation Plan). The compromise addressed the interests of AJ, Robert Jacobs, Elliott Jacobs, the E.J. companies, the Sonnenschine Group, Tudor, Allan Mirwis, Tenzer Greenblatt, LLP (Tenzer), New British, and New Yorktown. Tenzer had a claim against AJ for one and a half million dollars arising out of the lawsuits against AJ for fraud and mismanagement. According to one of the terms in the AJ Confirmation Plan, Tenzer agreed to take $700,000 in settlement (the Settlement Amount) of its claim against AJ. The Settlement Amount was to be paid to Tenzer out of funds provided from the proceeds of refinancing the properties or sale of the wrap notes. Under the Confirmation Plan, AJ would assign its one-half interest in the wrap notes to Tudor in exchange for Tudor's and its general and limited partners' release of all suits, causes of action, debts, sums of money, or demands against AJ and the Jacobs Group.[7] The Confirmation Plan required Tudor to "make a good-faith effort" to effectuate the refinancing of the wrap notes by the end of 1996. The part of the Confirmation Plan that eventually led to the instant controversy was the provision which stated:

> Tudor shall grant to the Sonnenschine Group an option to purchase the wrap notes in accordance with the terms and conditions as set forth in the Settlement Terms Letters attached hereto as Exhibit C and Exhibit D, and all such terms and conditions are incorporated herein.[8]

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[7] Tudor had obtained a judgment against AJ and the Jacobs Group for more than $9.7 million. By assigning its interest in the wrap notes, AJ satisfied Tudor's claim against it and the Jacobs Group.

[8] Apparently, this term of the Confirmation Plan was added because Tenzer threatened to proceed against New British and New Yorktown with an involuntary bankruptcy proceeding in New York because AJ owed Tenzer money for legal fees.

Exhibit C stated that the option could be granted to the designee of Sonnenschine; that upon exercise, the option shall transfer all right and title in the properties on or before December 15, 1996; that the Sonnenschine Group would deposit $250,000 with the Tudor Trustee in escrow within ten days after Judge Leonard signed the confirmation; that the closing date could be initially extended to January 1997 by the Tudor Trustee, and if not so extended the option would expire on December 15, 1997; and that the option may be extended to March 31, 1997 upon release of the $250,000 deposit and upon payment of one million dollars by Sonnenschine or its designee. New Horizon was named as the designee for the Sonnenschine Group.

The Confirmation Plan was "unanimously accepted by all voting creditors and equity security holders of [AJ], including all general unsecured creditors, the Partnerships, by and through their general partner, together with the assent and acquiescence of the Sonnenschine Group, Tudor Associates . . ., and the equity security holders." No other parties came forth at that hearing to reject the Confirmation Plan; however, Gerald Cohen, the attorney for certain of the Independent Limited Partners, did not attend the confirmation hearing. These limited partners were deemed to have accepted the Confirmation Plan via the general partner's acceptance of it. The bankruptcy court confirmed the Confirmation Plan on September 26, 1996.

On October 7, 1996, Cohen filed a notice of appeal of the September 26, 1996 AJ Confirmation Plan, alleging that the approved payment of funds to Tenzer could have been available for distribution to the Independent Limited Partners. He voluntarily withdrew that appeal on October 18, 1996. By the end of October 1996, the judgments against AJ and the Jacobs Group were vacated in accordance with the Confirmation Plan.

Also on October 7, 1996, New Horizon sent a letter to the Tudor Trustee informing him that the required $250,000 deposit was being held in an escrow account

opened by New Horizon's attorney and could be transferred to the Tudor Trustee when the option agreement was made final. Whether the Tudor Trustee had previously consented to leaving the deposit money in New Horizon's attorney's account is not shown. New Horizon proceeded to negotiate for financing in order to exercise the option according to the Confirmation Plan's terms. The Tudor Trustee and New Horizon continued to work out the specific terms of the option agreement and reached an agreement, after which the Tudor Trustee sought approval from the bankruptcy court in the Tudor bankruptcy.[9] On November 19, 1996, Cohen wrote a letter to the bankruptcy court objecting to the option agreement terms. The bankruptcy court did not consider this letter during the November 26, 1996 hearing on the approval of the option agreement because Cohen had sent the letter C.O.D., the bankruptcy court clerk refused to pay the charge, and Cohen did not attend the approval hearing. After the hearing, the bankruptcy court approved the option agreement in its entirety and found that it conformed with the Confirmation Plan.[10] On December 6, 1996, Cohen, on behalf of the Independent Limited Partners, filed another notice of appeal in the bankruptcy court contesting the November 26, 1996 order approving he option agreement between the Tudor Trustee and New Horizon. In a letter to the Independent Limited Partners, Cohen wrote that Sonnenschine had a troublesome record and that any money Sonnenschine paid to extend the option would be money that

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[9] The option agreement stated that if the option was exercised in accordance with the agreement's terms, the purchase price shall be the sum of: 1) the net $12,250,000 paid to Tudor, 2) payment of all sums necessary at closing to satisfy all existing liens senior to the mortgages, and 3) payment of $1,000,000 to the partnerships designated for payment to their law firms (Tenzer) as set forth in the AJ Confirmation Plan.

[10] The general partner of New British Woods and New Yorktown agreed to the option agreement. Cohen represented seven limited partners of New British Woods and New Yorktown.

could have been distributed to the Independent Limited Partners.

The terms of the option agreement imposed time constraints on New Horizon to exercise the option and close the purchase. On December 11, 1996, New Horizon paid the deposit, which had been with its attorney (perhaps in escrow), converting the option into a contract of sale. New Horizon could not, however, obtain financing for the purchase price of the wrap notes by the stipulated closing date. The Tudor Trustee extended the closing date at New Horizon's request to January 15, 1997, but informed New Horizon that to extend the date further, New Horizon would have to pay an additional one million dollar deposit by December 20, 1996. New Horizon did not make the additional deposit. On January 16, 1997, the district court dismissed the appeal filed by Cohen because the Independent Limited Partners did not designate items to be included on appeal or provide a statement of the issues to be presented within 10 days of filing its notice of appeal. The Independent Limited Partners had moved for an enlargement of time to designate the issues of appeal; however, the Tudor Trustee countered that motion by claiming that great prejudice would ensue to the Tudor estate by holding up the sale of the wrap notes.[11]

On January 14, 1997, New Horizon made a motion for enlargement of time to exercise the option and for other relief (motion for enlargement) instead of paying the additional one million dollar deposit to Tudor to extend the

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[11] A December 30, 1996 filing indicated that the Independent Limited Partners objected to the option agreement because they alleged that it was materially different from the terms in the Confirmation Plan and that Sonnenschine had forfeited the rights to the option by not complying with the option terms. This was a similar position to that taken earlier by Mirwis at the hearing on approval of the option agreement. We express no opinion on the effectiveness of these matters as a defense to the claim of contempt of court for taking a bad faith appeal.

option until March 1997 as provided in the option agreement and the Confirmation Plan. In its motion for enlargement, New Horizon objected to the December 6, 1996 appeal filed by Cohen. New Horizon contended that: 1) Cohen's clients, the Independent Limited Partners, as well as the Jacobs Group, had no standing to file the December 6, 1996 appeal; 2) Cohen filed the appeal in bad faith, for purposes of harassment or delay, and with intentional and willful disregard of the September 26, 1996 AJ Confirmation Plan; 3) the appeal tortiously interfered with the contractual rights of New Horizon and denied the full consummation of the AJ Confirmation Plan; and 4) even if the appeal was dismissed, a threat of on-going litigation harmed New Horizon and the AJ Confirmation Plan. Along with the motion for enlargement, New Horizon moved for an order to show cause as to why certain parties, including these defendants, should not be held in contempt of court and for injunctive relief (motion to show cause). In its motion to show cause, New Horizon alleged that the Independent Limited Partners and the Jacobs Group had violated the Confirmation Plan in civil contempt of the bankruptcy court's orders.

On February 3, 1997, the bankruptcy court held a hearing on New Horizon's motions. At the hearing, Judge Leonard stated that the option had expired and that the Tudor Trustee was free to deal with whomever he chose to find another buyer for the wrap notes. On February 6, 1997, the bankruptcy court entered its orders denying New Horizon its requested relief. New Horizon did not appeal these bankruptcy court orders to the district court.

Instead of appealing the bankruptcy court's orders, on February 25, 1997, New Horizon filed the complaint in the case at hand in the district court commencing this civil action. In its complaint, New Horizon sought compensatory and punitive damages and requested a jury trial.[12] New

[12] On February 20, 1998, New Horizon amended its complaint and added two more state law claims--tortious abuse of process and malicious prosecution.

Horizon based its lawsuit on the contention that the defendants were bound by the Confirmation Plan and received benefits from it; however, the defendants "engaged in a conspiracy to thwart consummation" of the option agreement by filing appeals and objections in the Tudor bankruptcy and by making contacts with the lender from whom New Horizon sought financing for the wrap notes sale and the general partner of New British and New Yorktown, all in an attempt to make the option fail.

On June 20, 1997, the district court entered an order in this case finding that the "substance of this matter is related to cases having arisen under Title 11" and referred it to the bankruptcy court. The bankruptcy court heard and determined an abundance of motions between June 1997 and October 1998. [13] After the bankruptcy court denied both parties' motions for summary judgment on October 22, 1998, the district court set a trial date. On November 3, 1998, the trial began in the district court.[14] The parties presented evidence to the jury on all of New Horizon's claims except the civil contempt of court claim. The district judge determined that he would decide the contempt matter and hear the testimony relating to it during the jury's deliberations. The jury returned its verdict in favor of New Horizon on November 25, 1998. The district court entered its

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[13] On August 5, 1997, Judge Leonard determined that his previous order of February 6, 1997 was not an adjudication of the contempt issue as against the defendants in this action. In fact the order of February 6, 1997 was brief and to the point. It described the matter as a "Motion to show cause [why a contempt action should not follow] and for injunctive relief." The action taken by the bankruptcy court was "this motion is denied." See footnote 20, infra.

[14] On October 23, 1998, the Jacobs Group defendants filed a motion to dismiss the entire action for lack of subject matter jurisdiction. Later, New Horizon filed a response in opposition to this motion and made a motion for sanctions against the Jacobs Group defendants for filing their motion.

order regarding the contempt matter and other post trial motions on July 19, 1999.[15] The Jacobs Group defendants and the Independent Limited Partners defendants appeal the final judgment entered on July 19, 1999 and amended on July 26, 1999. New Horizon did not appeal the denial of its civil contempt of court claim.

II.

While there are various issues raised on appeal, we must first consider the defendants' contention that the district court lacked subject matter jurisdiction over this case. Lack of subject matter jurisdiction may be raised at any time by the parties or the court. See Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 701-02 (1982); United States v. White, 139 F.3d 998, 999-1000 (4th Cir. 1998). The district court determined that this case was related to cases arising under title 11. We review its determination of subject matter jurisdiction de novo. See Folio v. City of Clarksburg, 134 F.3d 1211, 1214 (4th Cir. 1998).

To repeat, on February 6, 1997, before the case before us was filed, the bankruptcy court entered two orders in response to New Horizon's motion for enlargement of time

[15] The district court denied New Horizon's claim for civil contempt; motions for sanctions against the Jacobs Group defendants for filing a motion to dismiss for lack of subject matter jurisdiction; motions to strike and for sanctions against the Jacobs Group defendants relating to the defendants' late filing of two motions in limine; renewed motion for summary judgment; amended trial memorandum and proposed jury instructions; motions for sanctions regarding the failure of certain defendants to respond to interrogatories and requests for production of net worth; and motion for fees and costs relating to the supplemental proffer. The court also denied defendants' motion for judgment as a matter of law. The court granted New Horizon's motion for sanctions against the Jacobs Group for failure to respond to certain discovery requests and allowed attorneys' fees related to those sanctions.

and its motion to show cause. After a hearing and argument from New Horizon, the Tudor Trustee and the Independent Limited Partners, the bankruptcy court denied both of New Horizon's motions and entered its orders. New Horizon did not appeal these two adverse rulings to the district court, rather, it waited until after the time for filing an appeal had expired and then chose to file this entirely separate civil action against the Jacobs Group and the Independent Limited Partners based on the same factual scenario, but requesting money damages rather than injunctive relief.

In its complaint in the present case filed on February 25, 1997, New Horizon alleged jurisdiction under 28 U.S.C. § 1334 because it believed that this case was related to proceedings under title 11 of the United States Code. Section 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b). When Congress enacted § 1334, it "was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the power to adjudicate all matters having an effect on the bankruptcy." In re Wood, 825 F.2d 90, 92 (5th Cir. 1987) (citing S. Rep. No. 989, 95th Cong., 2d Sess., 153-54 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5939-40) (emphasis added).

New Horizon sought to invoke federal jurisdiction over claims it alleged were related to the AJ bankruptcy or the Tudor bankruptcy, either or both. Related to jurisdiction,

however, has a special meaning in the law,[16] and we must turn to the test approved by the Supreme Court in Celotex Corp. v. Edwards, 514 U.S. 300, 307-08 (1995), in determining whether the district court had subject matter jurisdiction in this case.[17] As the Court stated in Celotex, the "'related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simply proceedings involving the property of the debtor or the estate;" however, "'related to' jurisdiction cannot be limitless." Celotex, 514 U.S. at 308 (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)) (internal quotations omitted), and Board of Governors, FRS v. MCorp Financial Inc., 502 U.S. 32, 40 (1991) (Congress has vested limited authority in bankruptcy courts). See also In re Dow Corning Corp., 86 F.3d 482, 489 (6th Cir. 1996); In re Wood, 825 F.2d at 93 (stating that "the definition of [related to jurisdiction] of the Court of Appeals for the Third Circuit [Pacor] appears to have the most support"). A civil case filed in a district court is related to a case in bankruptcy if the outcome in the civil case "could conceivably have any effect on the estate being administered in bankruptcy . . . if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." Celotex, 514 U.S. at 308, n.6 (quoting Pacor, 743 F.2d at 994) (internal quotations omitted) (italics in Pacor).

This court has adopted the Pacor related to test and has held that a district court, "and derivatively the Bankruptcy court" has jurisdiction over an action related to a

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[16] Related to jurisdiction does not mean that the case is related in the ordinary sense of the word "related." Webster's defines "related" as "connected or associated." Webster's II New Riverside University Dictionary 992 (1988).

[17] Other federal question jurisdiction or diversity of citizenship is not claimed in this case.

bankruptcy case "if the outcome [of the proceeding] could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and [the proceeding] in any way impacts upon the handling and administration of the bankrupt estate." Spartan Mills v. Bank of Am. Ill., 112 F.3d 1251, 1255-56 (4th Cir.), cert. denied, 522 U.S. 969 (1997) (quoting Pacor, 743 F.2d at 994 (internal quotation marks omitted)). The Supreme Court gave the following as an example of a civil case related to a bankruptcy case: "suits between third parties which have an effect on the bankruptcy estate." Celotex, 514 U.S. at 307 n.5 (citing 1 Collier on Bankruptcy ¶ 3.01[1][c][iv] at 3-28 (15th ed. 1994)). Notably, as is the case here, a related to case need not necessarily be against the debtor or his property. Nevertheless, the "mere fact that there may be common issues of fact between a civil proceeding and a controversy involving a bankruptcy estate does not bring the matter within the scope of [1334(b)]." Pacor, 743 F.2d at 994.[18] In this circuit, a civil case is related to bankruptcy if "the outcome of[the civil] proceeding could conceivably have any effect on the estate being administered in bankruptcy." In re Celotex Corp., 124 F.3d 619, 625 (4th Cir. 1997) (citing Pacor, 743 F.2d at 994),[19] see also A. H. Robins Co. v. Piccinin, 788 F.2d 994, 1002 n.11 (4th Cir. 1986).

A.

New Horizon argues that the case at hand is related to other cases under title 11, and the district court referred the case to the bankruptcy court on those grounds. It argues that

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[18] The Pacor test has been adopted by the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits and the Supreme Court cited it with approval in Celotex. See Dow Corning, 86 F.3d at 489 (listing the circuits). See also Celotex, 514 U.S. at 308 n.6.

[19] Celotex in the Fourth Circuit is a different case than the Supreme Court's Celotex referred to throughout this opinion.

its civil contempt claim saves the day jurisdiction-wise: "[New] Horizon's contention below that the Defendants acted in contempt of the Confirmation Order." Thus, New Horizon rests all of its claims asserted here on the jurisdictional basis of the civil contempt of court claim. New Horizon asserts that "[t]he very integrity of the orders of a federal court is at issue here" because the contempt claim involves the alleged behavior of the defendants in contempt of the bankruptcy court's order confirming the AJ plan. According to New Horizon, if the district court had ruled in its favor on the contempt issue, "one of the conceivable remedies the court might have granted was to undo part or all of the [AJ] Confirmation Plan."

The argument goes that the contempt claim and the relief that could have been accorded to New Horizon on that claim would have had an effect on the estate being administered in bankruptcy. This potential effect on the bankruptcy estate, it continues, would then give the district court related to jurisdiction.

It is true that the integrity of the orders of a federal court are at issue here, but the record requires a result opposite to that advocated by New Horizon.

The problem with the reasoning of New Horizon is that it ignores the fact that the order of the bankruptcy court of February 6, 1997 was a final order because it was not appealed from on or before 10 days thereafter pursuant to 28 U.S.C. § 158(a) and § 158(c) and Rule 8002 of the Bankruptcy Rules. See also Bankruptcy Rule 9020 and In re Walters, 868 F.2d 665 (4th Cir. 1989). Thus, the claim in the complaint in this case that jurisdiction is established under 28 U.S.C. § 1334(b) as a related to case under Title 11 because of its claim that the defendants were guilty of civil contempt of the Bankruptcy Court depends for its success on a collateral attack on a final order of the bankruptcy court, which two opinions of the United States Supreme Court, Celotex Corp. v. Edwards, 514 U.S. 300 (1995), and Oriel v. Russell, 278 U.S. 358 (1929), have decided is not

permissible. We are of opinion that the jurisdictional base for this case should not be permitted to stand on a collateral attack which has been forbidden by two decisions of the Supreme Court.

The hearing on February 3, 1997 was the result of a motion filed in the Bankruptcy Court and dated January 14, 1997, seeking to hold the defendants in the present case:

> in civil or criminal contempt of prior orders of . .. [the bankruptcy court].

The "prior orders" of the bankruptcy court refer to the order of confirmation of the AJ plan with its associated terms, and the January 14th motion also asked for injunctive relief. On February 3, 1997, the court heard the motion for contempt and on February 6, 1997 entered the following order:

> This confirmed Chapter 11 case is before the court on a motion to show cause [why the defendants should not be cited for contempt] and for injunctive relief filed by New Horizon of NY, L.L.C. A hearing was held on February 3, 1997 in Raleigh, NC. For the reasons stated in open court, this motion is denied.
>
> So Ordered.

Although all of the parties were present in that proceeding so that the bankruptcy court could have given complete relief, such relief was denied and New Horizon did not appeal the denial of relief. Rather, it let the time for appealing expire and on February 25, 1997, some 19 days later, it filed its complaint in the case at hand. In that complaint was Count 3 "Civil Contempt of Court," the pertinent part of which is quoted in full as follows:

> The actions of each and every defendant, as described hereinabove, constitutes contempt of the United States Bankruptcy Court through the knowing, willful, and contumacious violation of the order of the Honorable J. Rich Leonard dated September 26, 1996 confirming AJ and AJ's plan of reorganization and the terms of the settlement.

Thus, it is patent that the civil contempt count, on which New Horizon bases its claim in this case of related to jurisdiction under § 1334, is nothing more nor less than a collateral attack on the order of the bankruptcy court of February 6, 1997. "Courts must speak by orders and judgments, not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or after trial, or during argument." Murdaugh Volkswagen v. First National Bank of SC, 741 F.2d 41, 44 (4th Cir. 1984).[20]

In Celotex Corp., 514 U.S. 300, the bankruptcy court for the Middle District of Florida issued an injunction prohibiting judgment creditors from executing on a supersedeas bond without the bankruptcy court's permission. Edwards was a judgment creditor and, despite the order of

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[20] On August 5, 1997, some six months later and more than five months after the filing of the case at hand, Judge Leonard referred to his February 6, 1997 order: "In this situation, the court has the luxury of hindsight. The primary issue at the [February] hearing was whether the court should grant the injunctive relief requested. The court denied this request, finding that the alleged misconduct was simply irrelevant to [New Horizon's] entitlement to the relief then sought. Having denied the injunctive relief, the court never considered the allegations underlying the contempt motion and did not adjudicate it. It follows that the court's February 6, 1997 order is not res judicata as to the present action."

The luxury of hindsight, however, is not a luxury afforded to a United States District Court, and thus not to a bankruptcy court. Lewis v. Tobacco Workers Int'l Union, 577 F.2d 1135, 1139 (4th Cir. 1978) (holding that an order appealed from may not be changed during a pending appeal). Thus the final order here was not subject to change.

the bankruptcy court enjoining the collection of the supersedeas bond, a Texas district court permitted Edwards to proceed on the bond, although the bankruptcy court's injunction had not been modified. The holding of the district court was that the earlier injunction of the bankruptcy court was erroneous although it had not been modified or reversed. That decision was affirmed by the Fifth Circuit, but the Supreme Court reversed, holding that "it is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected." 514 U.S. 300, 313. The Court further stated that the judgment creditor

> [i]f dissatisfied with the Bankruptcy Court's ultimate decision, . . . [could] appeal "to the district court for the judicial district in which the bankruptcy judge is serving," see 28 U.S.C. § 158(a), and then to the Court of Appeals for the Eleventh Circuit, see § 158(d). Respondents chose not to pursue this course of action, but instead chose to collaterally attack the Bankruptcy Court's Section 105 Injunction in the federal courts in Texas. This they cannot be permitted to do without seriously undercutting the orderly process of the law. (Italics added).

514 U.S. 300, 313. The Celotex Court relied on and followed its decision in Oriel v. Russell, 278 U.S. 358 (1929). That case, like the one at hand, concerned contempt citations. Contempt orders for violations of turnover orders had been entered by the district court and affirmed by the court of appeals following decision by the referee in bankruptcy to turn over the books and property in question from which no appeals were taken. On a motion to commit the bankrupts to jail, one attempted to introduce evidence on the issue of

whether or not at the time of the turnover order he had the books in question in his possession or under his control, and the other attempted to show omitted evidence in the turnover proceeding. Both the referee and the district court refused to re-try those issues on the ground that the turnover orders should not be collaterally attacked. The Court affirmed the court of appeals and stated that the orders of contempt are entered by a bankruptcy court with ". . . the understanding that it is rendering a judgment which is only to be set aside on appeal or some other form of review, or upon a properly supported petition for rehearing in the same court." 278 U.S. 358, 364.

Our circuit followed the holdings in Celotex and Oriel in Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th Cir. 1997). In that case, a Florida bankruptcy court had ordered the sale of property in the possession of the bankrupt notwithstanding the fact that there were conflicting liens claimed against the property and the order of sale of the property provided that the liens would be preserved against the fund. A later order of the bankruptcy court approved the sale of the property and established finally the order of liens against the fund. This order was not appealed from although Spartan Mills was a party to that proceeding. Later, Spartan Mills filed an action in the district court seeking a declaratory judgment that its lien was superior to the liens established by the bankruptcy court. The district court declined to grant relief because it held that "Spartan's action constitutes an improper collateral attack on the sale order issued by the United States Bankruptcy Court." 112 F.3d at 1254. We affirmed, relying on Celotex and Oriel. We reasoned that "a challenge for error may be directed to the ordering court or a higher court, as rules provide, but it may not be made collaterally unless it is based on the original court's lack of jurisdiction." 112 F.3d at 1255. In accord is Lindsey v. Ipock, 732 F.2d 619, 622 (8th Cir. 1984), holding that a lien claimant might not collaterally attack a bankruptcy court's order of sale in "collateral proceedings."

Celotex and Oriel have not been overruled, watered down, or questioned, by the Supreme Court, and our circuit precedent is entirely in accord with those cases. Thus, we conclude that the related to jurisdiction claimed by New Horizon is not to be supported by a collateral attack on an order of the bankruptcy court, which attack is quite contrary to Supreme Court and our own circuit precedent.

B.

We now examine whether New Horizon's other claims made in their complaint under state law are related to a bankruptcy case so as to provide subject matter jurisdiction under § 1334(b). During oral argument, counsel for New Horizon conceded that "this case is based on an [allegedly] frivolous or bad faith appeal from an order of the bankruptcy court as a matter of state law."

In consideration of this question, we are reminded that the standard for related to jurisdiction under § 1334 is from Pacor, 743 F.2d 984, as set out in Celotex, 514 U.S. 300, 308 n.6, as follows:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy [under§ 1334] is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.
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> (Emphasis in original).

The defendants argue that the state law claims brought by New Horizon, tortious interference with a contract, breach of contract, malicious prosecution, abuse of process, and unfair and deceptive trade practices, do not alter AJ's or Tudor's rights or liabilities or impact the handling or administration of the AJ bankruptcy or the Tudor bankruptcy.

The following facts are uncontradicted: New Horizon is not a debtor or a creditor in either the AJ or Tudor bankruptcy, rather it is an entity created for the purpose of acquiring, post-confirmation, an interest in an asset; neither the AJ nor the Tudor bankrupt estate is a party to this action; the defendants are not debtors in either bankruptcy nor are they bankruptcy creditors; and New Horizon is not seeking to have the court enforce or implement any order touching upon a bankrupt estate.

In its complaint, New Horizon requested that the district court award compensatory and punitive damages against these defendants s relief for its claims rather than relief regarding the Confirmation Plan, the expired option, or the wrap notes. The bankruptcy court made its final order on February 6, 1997 regarding the Tudor Trustee's right and ability to sell the wrap notes to whomsoever the Trustee chose. New Horizon's option to buy the wrap notes was deemed to be expired and was not revived, and New Horizon also failed to appeal that judgment. Instead, New Horizon now prays for damages, all of which are against these defendants and are completely unrelated to the sale of the wrap notes or the administration of the bankruptcy estates. Any damages paid by the Jacobs Group defendants or the Independent Limited Partners defendants would come out-of-pocket from those defendants, none of whom were debtors or creditors in either bankruptcy and would have no effect on either bankrupt estate. Any recovery would not inure a benefit to the AJ bankrupt estate or the Tudor bankrupt estate, and an order or judgment in this case would not modify or affect either estate. In fact, the wrap notes

were sold to another purchaser in September 1997, pursuant to the bankruptcy court's unappealed order, for a higher purchase price,[21] and the AJ estate was settled months before, and unaffected by the trial in this case. Based on the facts we have mentioned, we find that the resolution of the claims in the case at hand could have no conceivable effect on the AJ and Tudor bankruptcy estates, and therefore, this case is not related to the AJ bankruptcy case nor the Tudor bankruptcy case within the meaning of 28 U.S.C. § 1334.

C.

New Horizon's other arguments in support of related to jurisdiction fail as well. New Horizon asserts that the bankruptcy court retained jurisdiction over the Confirmed Plan with AJ bankruptcy, and therefore, it should have jurisdiction in this case. The plan cannot confer jurisdiction upon a bankruptcy court or a federal district court, see 8 Collier on Bankruptcy ¶ 1142.04[1], rather 28 U.S.C. § 1334 governs jurisdiction. And, in all events, nothing about this case, nor the result thereof, has or may have any conceivable effect on either the AJ or Tudor bankrupt estates, nor does it alter the debtors rights, liabilities, options, or freedom of action (either positively or negatively) or in any way impacts upon the handling and administration of either bankrupt estate. Celotex, 514 U.S. 300, 308, n.6.

III.

Because resolution of this action for or against these defendants could not affect the bankrupt estates or the debtors in any way pursuant to the Pacor rules as adopted by the Court in Celotex and by this court in Robins and Spartan Mills and our own Celotex, we hold that the district court did

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[21] If anything, the Tudor estate benefitted from the subsequent sale to another purchaser. But that was not affected by the result in the case at hand.

not have related to jurisdiction under 28 U.S.C. § 1334 in this case. We especially note that we express no opinion on the merits of the state law claims asserted in this case.

Accordingly, the judgment of the district court appealed from is vacated and the case is remanded to the district court for dismissal without prejudice for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-126-BR

FILED
JUL 19 1999
DAVID W. DANIEL, CLERK
US DISTRICT COURT
E.DIST.N.CAROLINA

NEW HORIZON OF NY, LLC.

Plaintiff,

v.

ROBERT JACOBS; ALAN JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. PROPERTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; STANLEY LANE; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; PETER DAPUZZO; HOWARD ROSEN; and RUTH SCHARF,

Defendants.

ORDER

Entered: July 19, 1999

This matter is before the court on the following: (1) plaintiff's claim for civil contempt of court; (2) plaintiff's claim for trebling of the jury's unfair trade practice verdict; (3) plaintiff's motion for sanctions against the Jacobs Group defendants for filing the motion to dismiss for lack of subject

matter jurisdiction; (4) plaintiff's motion to strike and for sanctions against the Jacobs Group defendants relating to defendants' late filing of two motions in limine, renewed motion for summary judgment, amended trial memorandum and proposed jury instructions; (5) plaintiff's motion for sanctions regarding defendants' failure to respond to interrogatories and requests for production on the issue of defendants' net worth; (6) plaintiff's motion for attorney's fees and non-taxable litigation costs;[1] (7) Jacobs Group defendants' motions for judgment as a matter of law, for a new trial and to alter or amend judgment; (8) defendants Lane, Scharf, Rosen and Dapuzzo's motion for judgment as a matter of law and for a new trial; (9) defendants Lane, Scharf, Rosen and Dapuzzo's motion for expenses and costs pursuant to Fed. R. Civ. P. 37; (10) Jacobs Group defendants' supplemental proffer of evidence; and, (11) plaintiff's motion to strike the supplemental proffer of evidence. All of these matters are ripe for decision.

I. BACKGROUND

The facts and procedural background of this case are lengthy and intricate. They will not and need not be recounted in full herein. However, a brief explanation of the most recent proceedings is necessary for an understanding of the disposition of the matters at bar. Other facts which may be necessary to the disposition of any one of the matters enumerated above may be explained when that matter is discussed.

The trial of this case began on 2 November 1998 with a hearing on several dispositive and evidentiary motions. A jury was selected and impaneled on 3 November 1998, and the presentation of evidence continued from that date until

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[1] By order dated 21 January 1999, the court deferred briefing and consideration of plaintiff's application for fees and costs until 10 days after the court's ruling on the issues addressed in this order. Plaintiff's motion for a bill of costs will be decided by the Clerk of Court.

24 November 1998. On 24 November 2998, as the jury deliberated, the court conducted a bench trial on plaintiff's claim for civil contempt of court. The jury returned a verdict on 25 November 1998 in which plaintiff was awarded in excess of six million dollars in compensatory and punitive damages. As part of this verdict, the jury found that at least some of the defendants engaged in conduct specified in the special interrogatories regarding unfair and deceptive trade practices. Following the entry of the jury's verdict, the court instructed the parties to brief the issues of civil contempt and trebling the jury award regarding unfair and deceptive trade practices. This briefing is complete, all matters are ripe for decision, and each will be addressed herein.

II. DISCUSSION

A. Plaintiff's Claim for Civil Contempt of Court

On 26 September 1996, the Bankruptcy Court entered the Order Confirming Plan of AJ & AJ Servicing Inc. (Order Confirming Plan). Plaintiff argues that all defendants should be held in civil contempt based on their deliberate "efforts to sabotage elements of the Confirmed Plan" to which none of them objected. (Pl.'s 26 Oct. 1998 Mem. of Auth. at 29.) The Order Confirming Plan provided, among other things, that

> Tudor shall grant to the Sonnenschine Group an option to purchase the Wrap Notes in accordance with the terms and conditions as set forth [in] the Settlement Terms Letters attached hereto as Exhibit C and Exhibit D, and all of such terms and conditions are incorporated herein.

(Order Confirming Plan at 5, ¶ 3.) The Jacobs Group defendants consented to the order through their attorney, and the general partner of the partnership signed the order on behalf of the other defendants. (Pl.'s 26 Oct. 1998 Mem. of Auth. at 30.)

On 26 November 1996, an order was entered in the Tudor bankruptcy entitled "Order Approving Option Agreement, Private Sale of Notes and Mortgages and Placement of Net Sale Proceeds in Escrow" (hereinafter November 26 Order). In the 26 November Order, the bankruptcy court set out the terms under which the option awarded in the September 26 Order Confirming Plan should be extended. Defendants, through their attorney, Gerald Cohen, appealed the November 26 Order.

Plaintiff argues that defendants violated the option provision of the September 26 Order through "their efforts to prevent the Sonnenschine designee[,New Horizons,] from closing on the options transaction." (26 October 1998 Pl.'s Mem. of Auth. at 30.) Citing In re Krypton Broadcasting of Ft. Pierce, Inc., 181 B.R. 657 (Bankr. S.D. Fla. 1995) and Rhode Island Hosp. Trust National Bank v. Howard Communications Corp., 980 F.2d 823, 829 (1st Cir. 1992), plaintiff argues that efforts to prevent the implementation of portions of a confirmed plan have been held to constitute contempt of an order confirming a plan of reorganization.

Among other things, plaintiff suggest that the defendants tried to prevent the sale by appealing the November 26 Order and that such an appeal constituted an impermissible collateral attack on the September 26 Order by which they were bound. (26 October 1998 Pl.'s Mem. of Auth. at 32.) In essence, plaintiff contends that the defendants consented to the September 26 Order even though they were opposed to it in order to obtain the various benefits for themselves under the Order Confirming Plan and that they set about attacking the Plan collaterally in order to prevent plaintiff from purchasing the wrap notes. (26

October 1998 Pl.'s Mem. of Auth. at 35.) For these reasons, plaintiff believes defendants should be sanctioned.

> To establish civil contempt [complainant] must prove: (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) a showing that the decree was in the movant's "favor"; (3) a showing that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) a showing that movant suffered harm as a result.

Colonial Williamsburg Foundation v. Kittinger Company, 792 F. Supp. 1397, 1405-06 (E.D. Va. 1992) aff'd, 38 F.3d 133, 136 (4th Cir. 1994); Omega World Travel, Inc. v. Omega Travel Inc., 710 F. Supp. 169, 170 (E.D. Va. 1989), aff'd, 905 F.2d 1530 (4th Cir. 1990). The complainant must show civil contempt by clear and convincing evidence. Colonial, 792 F. Supp. at 1406; and In re General Motors, Corp., 61 F.3d 256, 258 (4th Cir. 1995), opinion after remand, 110 F.3d 1003 (1997) cert. denied, 118 S. Ct. 61 (1997). Willfulness is not an element of civil contempt. General Motors, 61 F.3d at 258.

As plaintiff recognizes, to make out an action for civil contempt, plaintiff must show, among other things, that defendant violated a specific and definite order. In re General Motors, 61 F.3d 256, 258 (4th Cir. 1995). The Fourth Circuit has explained that "[c]ivil contempt is an appropriate sanction if we can point to an order of this Court which 'set[s] forth in specific detail an unequivocal command' which a party has violated." Id. (citing Ferrell v. Pierce, 785 F.2d 1372, 1378 (7th Cir. 1986)). See also United States v. Cutler, 58 F.3d 825, 834 (2nd Cir. 1995) (same); D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 460

(7th Cir. 1993) ("party can only be held in contempt for behavior clearly prohibited by a court order 'within its four corners.'" (citations omitted)); Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991) ("civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous"); Koehler v. Grant, 213 B.R. 567, 570 (8th Cir. BAP 1997) (same). The existence of a clear and unequivocal order is therefore essential to a finding of contempt. The 26 September Order Confirming Plan does not unequivocally prohibit defendants from appealing its terms, nor does it clearly and unequivocally prevent them from appealing an related order in the Tudor bankruptcy.

In the cases relied on by plaintiff, the orders violated were highly specific, prohibiting enumerated actions or requiring certain actions. In Krypton Broadcasting, for example, the order confirming the plan of reorganization specifically required that the officers and directors of the debtor corporations to sign the FCC applications necessary for the transfer of broadcast licenses, to supplement the applications as necessary, and to "support approval of" those applications. Krypton Broadcasting, 181 B.R. at 662. In that case, the debtors' sole director "took action seeking to defeat rather than support the FCC applications." Id. Among other things, he filed with the FCC a petition to deny application for transfer of control of the station, and an informal objection to the application for assignment of licenses to the new owners. Id. The court held that the director's actions in direct contravention of the terms of the order constituted an impermissible collateral attack on the order. In Rhode Island, 980 F.2d at 829, the court of appeals affirmed the district court's finding of contempt where appellant-guarantors had been explicitly enjoined "to cooperate and to 'refrain from ... imped[ing] the receiver in the performance of his duties in any way'" and yet they had taken several actions designed to prevent the receiver from obtaining the FCC's approval of the necessary license transfers. Likewise, in Omega World Travel, a travel agency was held in

contempt because it used the word "Omega" in a Yellow Pages advertisement in a manner expressly prohibited by a consent decree in a trademark infringement action. Omega World Travel, 710 F. Supp. at 170-171. Similarly, in General Motors, despite the court's clear command that specific portions of a certain recusal order were not to be cited as authority, plaintiff's counsel, in the context of a subsequent proceeding in another court, cited and quoted directly from the language of the order that had been stricken. General Motors, 61 F.3d at 259. Finally, in Columbia Gas Transmission Corp. v. Mangione Enterprises of Turf Valley, L.P., 964 F. Supp. 199, 199-200 (D. Md. 1996), the contemnor failed to comply with an injunction requiring it specifically to remove certain permanent structures encroaching upon complainant's right of way adjacent to their natural gas pipelines by a certain date.

Because plaintiff has not shown that defendant violated a specific and definite order, plaintiff has not established civil contempt. Plaintiff does argue persuasively that, after consenting to the confirmed plan and taking advantage of all the benefits to which the plan entitled them, defendants took several actions designed to undermine that plan and to prevent the Sonnenschine Group's designee from being able to close on the option to purchase the wrap notes. The fact that such conduct may be deserving of punitive sanctions, however, does not mean that it satisfies the standard of civil contempt. While a court may award relief to a petitioner and award sanctions designed to punish the contemnor and vindicate the authority of the court in proceedings for *criminal* contempt, see In re E.I. DuPont de Nemours & Company-Benlante Litigation, 99 F.3d 363, 368 (11th Cir. 1996), cert. denied, 118 S. Ct. 263 (1997), *civil* contempt orders are imposed only to compel or coerce obedience to a court order, or to compensate the parties for losses resulting from the contemnor's non-compliance with a court order. General Motors, 61 F.3d at 258. See also Colonial Williamsburg, 792 F. Supp. at 1407; In re Snider

Farms, Inc., 125 B.R. 993, 997 (Bankr. N.D. Ind. 1991)(citing United States v. United States Mine Workers of America, 330 U.S. 258, 303-04 (1947)).

The language of plaintiff cites from Bush Ranch, Inc., v. E.I. du Pont de Numours and Co., 918 F. Supp. 1524 (M.D. Ga. 1995), rev'd, 99 F.3d 363 (11th Cir. 1996), cert. denied, 118 S. Ct. 263 (1997), undermines plaintiff's argument that a finding of civil contempt is appropriate here. In that case, the district court emphasized the fact that DuPont cheated - - consciously, deliberately and with purpose. "DuPont has committed a fraud on this Court, and this Court concludes that DuPont should be, indeed must be, severely sanctioned if the integrity of the Court system is to be preserved." Id. at 1556. First, defendants' intent or purpose in taking the actions they took is irrelevant to a civil contempt inquiry. Secondly, as noted above, a sanction for civil contempt is not awarded to vindicate the authority of the court or to punish the alleged contemnors. Rather, a civil sanction is properly awarded to compensate the complainants or to coerce compliance with a court order. As the Eleventh Circuit noted in its opinion reversing the Bush Ranch decision cited by plaintiff, it had little trouble in concluding "that the sanctions the district court imposed were overwhelmingly punitive - - and thus criminal - - in nature." Bush Ranch, 99 F.3d at 368. "We are persuaded that the sanctions imposed by the district court ... were designed to punish DuPont for flouting the authority of the district court." Id. at 369.

As the Supreme Court explained in International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821 (1994), the civil or criminal nature of a contempt proceeding or sanction is properly drawn from an examination of the relief afforded. Bagwell, 512 U.S. at 827-828 ("whether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved" and "conclusions about the civil or criminal nature of a contempt sanction are properly drawn ... 'from an examination of the

character of the relief itself'" (citations omitted)). If this court were to attempt to impose contempt sanctions upon defendants based on the flagrancy of their conduct, such sanctions would properly be described as punitive, and therefore criminal, in nature. See General Motors, 61 F.3d at 259. In light of the foregoing principals, even a careful consideration of the egregious nature of defendants' behavior cannot support a finding of civil contempt where the order allegedly violated does not specifically and unequivocally prohibit defendants' conduct.

B. Trebling of the Jury's Unfair Trade Practice Verdict

North Carolina General Statute §75-16 provides, in part, that when any corporation is injured in violation of Chapter 75, "judgment shall be rendered in favor the plaintiff and against the defendant for treble the amount fixed by the verdict." N.C. Gen. Stat. §75-16. In this case, within Issue 8, the jury was presented with several specific interrogatories addressing the conduct of each defendant. The jury responded "yes" to some of these interrogatories and "no" to others. While the activity included in the interrogatories to which the jury responded in the negative will not affect this discussion, the activity included in the interrogatories to which the jurors responded affirmatively must be examined. Specifically, to determine whether plaintiff was injured in violation of Chapter 75, this court must determine if those actions, which the jury determined at least one of the defendants engaged in, was "in or affecting commerce." N.C. Gen. Stat. §75-1.1. Any party claiming exemption from the statute has the burden of proof with respect to that claim. N.C. Gen. Stat. §75-1.1(d). Thus, in this case, the burden is on the defendant to show that their acts were not in or affecting commerce.

"Commerce" includes all business activities, but does not include professional services provided by a member of a

learned profession. Broadly interpreted by North Carolina courts, the term includes interaction between borrower and mortgage broker, Johnson v. Phoenix Mutual Life Insurance Co., 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980), overruled on other grounds, Meyers & Chapman Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 569. 374 S.E.2d 385, 392 (1998), as well as the interaction between borrower and lender. Pedwell v. First Union National Bank, 51 N.C. App. 236, 237, 275 S.E.2d 565, 566 (1981). See also, Bhatti v. Buckland, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (business activities include financial transactions). In this case, the activities which the jury found the defendants to have engaged in as described in the special interrogatories to Issue 8, had a direct effect upon the financing transaction between plaintiff, Patrician and Nationsbank, and prevented plaintiff from securing the financing necessary to exercise its option to purchase the wrap notes. These actions affected commerce and consequently fall within the statutory definition.

Whether certain actions are unfair or deceptive is also a matter of law for the court to determine. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 230, 314 S.E.2d 582, 584, review denied, 211 N.C. 751, 321 S.E.2d 126 (1984). North Carolina courts have stated that "a practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious . . . ." Johnson, 300 N.C. at 263, 266 S.E.2d at 621. A court must determine whether an action is unfair or deceptive without regard to negligence, bad faith or lack or any intent to deceive. Bernard, 68 N.C. App. at 230-231, 314 S.E.2d at 584; see also, Murray v. Nationwide Mutual Insurance, Co., 123 N.C. App. 1, 10, 472 S.E.2d 358, 363 (1996), review denied, 345 N.C. 344, 483 S.E.2d 172, 173 (1997).

The case of Pedwell v. First Union National Bank, 51 N.C. App. 236, 275 S.E.2d 565 (1981) is factually similar to the case at bar. In Pedwell, plaintiff alleged that the

defendant bank contracted to sell a condominium to the plaintiffs; that, after making the contract, the bank decided that it did not want to sell the condominium to the plaintiffs; that the bank then agreed with a third party that the third party would not loan the plaintiffs the funds necessary to finance the purchase of the condominium and that the third party would not notify the plaintiffs of the refusal of the loan until it was too late for the plaintiffs to find alternative financing; and, finally, that the third party refused to loan the money to the plaintiffs, not for a business reason but in order to prevent the plaintiffs from performing under the contract. Id. at 237-238, 275 S.E.2d at 566-567. The North Carolina Court of Appeals held these allegations by plaintiff stated a cause of action under Chapter 75. Specifically, the court wrote: "if the bank entered into the agreement with the [third party] to prevent the plaintiffs from performing this part of the contract and the [third party] did in fact prevent the plaintiffs from so performing, . . . this would be an 'unfair . . . act . . . affecting commerce' under G.S. [§] 75-1.1(a)." Id. at 238, 275 S.E.2d at 567 (citations omitted). In the case at bar, the jury's responses to the special interrogatories of Issue 8 indicate that it believed that at least some of the defendants engaged in conduct similar to the conduct the Pedwell court stated would constitute a violation of Chapter 75. This court specifically finds that the conduct described in each of the interrogatories as to each defendant to which the jury answered "yes" was in or affecting commerce and was unfair or deceptive, and thereby constituted a violation of Chapter 75.

This finding means that, as to those defendants, the amount of the jury's verdict will be trebled as required by N.C. Gen. Stat. §75-16. In accordance with the specific interrogatories, the damage award will be trebled as to the following defendants: Stanley Lane; Howard Rosen; David Queller; David Queller, Inc.; Ira Born; Robert Jacobs; Elliot Jacobs; Allan Mirwis; E.J. Servicing, Inc.; E.J. Realty Management Corp.; and E.J. Property Consultants. The

verdict will not be trebled as to Peter Dapuzzo or Ruth Scharf because, as set forth in the response to the interrogatories within Issue 8, the jury found that neither of these defendants engaged in any of the conduct described.

Plaintiff has argued that the jury's verdict should be trebled as to all defendants, independent of the responses to the interrogatories. Plaintiff claims that the jury's finding of joint and several liability as to all defendants on the causes of action of tortious interference with contract, malicious prosecution, abuse of process, and breach of contract are enough to support a Chapter 75 violation. The court, however, disagrees. In this case, the specific actions of the defendants that violated Chapter 75 were presented to the jury in the form of interrogatories at the request of plaintiff and in compliance with North Carolina Pattern Jury Instructions. In fact, the wording of the seven special interrogatories submitted to the jury was suggested by plaintiff. With the benefit of the jury's verdict specifically directed to the conduct of each defendant, the court believes it is best to rely upon that verdict as a basis for the imposition of Chapter 75 liability and ensuing damages.

Courts have recognized that Chapter 75 liability does not arise in every business dispute. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998); Hageman v. Twin City Chrystler-Plymouth, Inc., 681 F. Supp. 303 (M.D.N.C. 1988). Further, a cause of action under Chapter 75 is a separate and distinct cause of action from one plead as breach of contract or fraud. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert denied, 311 N.C. 751, 321 S.E.2d 126 (1984). An action for unfair and deceptive trade practices is not based upon any contractual relationship between a plaintiff and a defendant. United Virginia Bank v. Air-Lift Assoc., 79 N.C. App. 315, 339 S.E.2d 90 (1984). Neither is it an action based wholly in tort. Bernard, 68 N.C. App. at 230, 314 S.E.2d 582, 584. It is "the creation of . . . statute. It is, therefore, sui generis. It is neither wholly tortious nor

wholly contractual in nature. . . ." Id. (quoting Stanley v. Westwood Auto, Inc., 366 Mass. 688, 704, 322 N.E.2d 768, 779 (1975)). While fraudulent behavior may evoke the action, it is not an action for fraud. Holley v. Coggin Pontiac, 43 N.C. App. 229, 241, 259 S.E.2d 1, 9, disc. rev. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

It is clear to this court that Chapter 75 creates a cause of action unlike any other. It is because of the unique nature of this cause of action that the court, with plaintiff's consent presented Issue 8 to the jury in the form of interrogatories delineating specific conduct. The jury then determined that some of the defendants engaged in some of that conduct. The court will not now go beyond the answers given by the jury to base a Chapter 75 award upon the general verdicts as to other, clearly distinct, causes of action. The trebling of the damages as required by Chapter 75 award, will be based only upon the jury's response to those specific interrogatories of Issue 8.

Plaintiff has requested that it be awarded prejudgment interest on the compensatory damages award because such should be regarded as substantive right under North Carolina law. It is true that the courts have held that state law applies to questions involving prejudgment interest in diversity cases. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941); Hitachi Credit America Corp. v. Signet Bank, 166 F.3d 614, 633 (4th Cir. 1999); United States v. Dollar Rent A Car Systems, Inc., 712 F.2d 938 (4th Cir. 1983). However, this case, while it does involve state law causes of action, does not derive its federal jurisdiction from diversity of citizenship but from its relationship to a bankruptcy proceeding. Therefore, "the district court is not bound by the interest rate of the forum state in determining the rate of prejudgment interest, but must use its discretion in setting the proper rate." Dollar Rent A Car Systems, Inc., 712 F.2d at 941. See also, E.E.O.C. v. Liggett & Myers, Inc., 690 F.2d 1072 (4th Cir. 1982) (determination of certain rate of prejudgment interest generally matter within

discretion of district court). In exercising this discretion, the court will look to North Carolina law for guidance.

North Carolina General Statute §24-5 provides in part

> (b) . . . In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in action other than contract shall be at the legal rate.

N.C. Gen. Stat. §24-5 (Supp. 1998). Because there were several causes of action, including contract, tort and Chapter 75, for which the jury awarded damages, the court will apply the above quoted statute. The jury found the amount of compensatory damages to be $6,491,835.00.

The legal rate in North Carolina is 8% per annum. N.C. Gen. Stat. §24-1 (Supp. 1998). Prejudgment interest from the date that the action was instituted, 25 February 1997, until the entry of judgment, 25 November 1998, will be calculated at this rate. The amount will be calculated on the jury's award of compensatory damages, not on the trebled amount, for a total compensatory award as follows:

$6,491,835.00 x .08 = $519,346.80

Interest for 25 February 1997 - 24 February 1998 = $7,011,181.80. (6491835.00 + $519,346.80)

$7,011,181.80 x .08 = $560,894.54.

Interest prorated for partial year from 25 February 1998 - 25 November 1998 (273 days) = $560,894.54 divided by 365 = $1,536.70 (daily interest amount).

$1,536.70 x 273 = $419,519.10

$7,011,181.80 + $419,519.10 = $7,430,700.90

This amount will be imposed against the two defendants, Scharf and Dapuzzo, and postjudgment interest will accrue on that amount at the federal rate from 25 November 1998 in the manner established in 28 U.S.C. §1961. That amount will be trebled as to those defendants who the jury found engaged in any of the conduct specified in Issue 8 of the interrogatories for a total judgment against those defendants in the amount of $22,292,102.70. Postjudgment interest will accrue on the trebled amount from the date of the entry of judgment until the judgment is fully paid at the interest rate established for all federal judgments pursuant to 28 U.S.C. §1961. See Forest Sales Corp v. Bedingfield, 881 F.2d 111 (4th Cir. 1989); Custom Molders, Inc. v. American Yard Products, Inc., 324 N.C. 133, 463 S.E.2d 199 (1995).

C. Plaintiff's Motion for Sanctions against Jacobs Group defendants for filing Motion to Dismiss for Lack of Subject Matter Jurisdiction

Rule 15 of the Local Rules of this court states: "If any attorney or any party fails to comply in good faith with any local rule of this court, this court in its discretion may impose sanctions." (Local Rule 15 EDNC). The court will apply this Rule to this, and all other motions for sanctions, unless otherwise noted.

On 29 October 1998, plaintiff filed an opposition to the Jacobs Group defendants' motion to dismiss for lack of subject matter jurisdiction and included therein, a motion for sanctions. The motion to dismiss was denied; however, plaintiff maintains that it was only filed in an effort to delay trial and to distract plaintiff's counsel from trial preparation.

Plaintiff listed thirteen "tactics" it claimed these defendants engaged in from the time defendants' current counsel filed their notice of appearance on 11 September 1998 until the request for sanctions was made. While some of the items listed do appear questionable, the court cannot say they were for the purpose of delay. The motion to dismiss for lack of subject matter jurisdiction, likewise, may have been filed at a questionable time. However, all parties and the court are aware that subject matter jurisdiction is an issue that can be raised at any time by the parties or the court. See United States v. White, 139 F.3d 998, 999-1000 (4th Cir.) cert. denied, 119 S.Ct. 343 (1998). The filing of this motion, though done late in the game, is simply not something upon which this court will base sanctions. Plaintiff's motion will be denied.

D. Plaintiff's Motion for Sanctions and to Strike Jacob Group Defendants' Motions in Limine, Renewed Summary Judgment Motion, Amend Trial Memorandum and Proposed Jury Instructions

On 30 October 1998 plaintiff filed this motion for sanctions and to strike along with a supporting memorandum. Defendants responded on 2 November 1998. Plaintiff based its motion on the fact that defendants' filings were untimely pursuant to Local Rule 25.01 EDNC which requires all motions in limine, trial memoranda, and proposed jury instructions to be filed "five business days preceding the first day of the session at which a civil action is set for trial. . . ." The trial of this matter was set for 2 November 1998, thus making 26 October 1998 the deadline for such filings. Defendants filed the motions in limine about which the plaintiff complains on 27 and 28 October 1998 and the proposed jury instructions on 29 October 1998. They filed the amended trial memorandum on 27 October 1998 and the proposed jury instructions on 29 October 1998.

As the trial of this matter is concluded, and the motions in limine at issue were denied, the request to strike these filings will be denied as moot. The request for sanctions will also be denied. As to the motions in limine, they were untimely by only one day. Additionally, the topic that these motions addressed were related only to damages and plaintiff was able to respond to them at the same time it responded to the timely filed motions in limine on 2 November 1998. (See Docket Entry 90, responding to these and other motions in limine). Plaintiff was obviously not prejudiced by this one-day late filing. As to the filing of the amended trial memorandum one day late, the analysis is similar. Plaintiff was not prejudiced by the delay. Further, these defendants technically complied by timely filing the original trial memorandum. The amendment filed on day later cannot be grounds for sanctions. Addressing the late filing of the jury instructions, it should be noted that these materials are filed in order to assist the court in preparation of the instructions it will ultimately give the jury an allow the parties an input into this process. The proposed instructions are not a filing to which the other side need respond. Thus, the fact that these defendants filed their proposed instructions three days late did not prejudice plaintiff. If anything, it prejudiced the court; however, such a minimal delay in the submission of the proposed instructions while not condoned by the court, will not be the basis for any sanction.

Finally, plaintiff directed this motion to the 27 October 1998 filing by defendants Queller; Queller, Inc., and Born of a renewed and supplemental motion for summary judgment. That motion was summarily denied in open court on 2 November 1998 and the request to strike it will be denied as moot. Plaintiff did not file a response to that motion and was not prejudiced by the untimely filing. While the motion might very well have been inappropriate given previous rulings by the bankruptcy court, its filing cannot support an award of sanctions.

E. Plaintiff's Motion for Sanctions against All Defendants' Failure to Respond to Discovery Related to Net Worth

The factual background underlying this motion is somewhat lengthy and must be recounted in order for the ruling of the court to be understood. On 4 February 1997, plaintiff served the Jacobs Group defendants with Interrogatories and Requests for Production of Documents seeking information about, among other things, the financial net worth of the defendants. On 25 April 1997, plaintiff served similar pleadings on defendants Lane, Rosen, Scharf and Dapuzzo. All defendants objected to the discovery requests as personal and confidential. On 10 March 1998, plaintiff moved to compel responses from defendants Lane, Rosen, Scharf and Dapuzzo and they again objected on 2 April 1998. On 11 May 1998, Bankruptcy Judge J. Rich Leonard held a hearing on plaintiff's motion to compel at which time he said that he would revisit the issue at the pretrial conference. On 7 October 1998, plaintiff moved to compel responses to the net worth discovery from the Jacobs Group defendants. On 22 October 1998, Judge Leonard ordered all defendants to respond fully to plaintiff's discovery requests regarding their financial net worth by close of business 30 October 1998.

The Jacobs Group defendants moved for a protective order and also wrote a letter to this court, with a copy to plaintiff's counsel, dated 30 October 1998 enclosing the pertinent documents in an effort to file the documents under seal.[2] By letter dated 30 October 1998 to counsel for the Jacobs Group defendants, plaintiff's counsel informed them that these actions were in violation of Judge Leonard's order. Thereafter, counsel for these defendants produced certain documents to plaintiff's counsel but requested they be kept

[2] Counsel did provide plaintiff with the net worth information for defendants EJ Servicing, Inc., EJ Realty Management Corp., and EJ Property Consultants, Inc. on 30 October 1998.

sealed pending a ruling from this court on the motion for a protective order.

On 30 October 1998, counsel for defendants Rosen, Lane, Scharf and Dapuzzo also moved for a protective order and attempted to file their responses to the net worth discovery under seal. Counsel for these defendants provided the documents to counsel for plaintiff on 1 November 1998, also requesting that they not be opened until a ruling on the motion for a protective order could be made. On 2 November 1998, plaintiff filed the instant motion pursuant to Fed. R. Civ. P. 37 requesting that the answer of defendants be stricken and default be entered for plaintiff as sanctions for the defendants' failure to comply with Judge Leonard's order.

On 2 November 1998, at a hearing on various motions in limine, this court denied defendants' motions for protective orders and gave to plaintiff the documents that defendants had given to the court, without reviewing them. On 9 November 1998, plaintiff again moved to compel discovery responses as to the net worth information, arguing that the documents received on 2 November 1998 form Robert Jacobs, Elliot Jacobs, Alan Mirwis, David Queller, David Queller, Inc., and Ira Born were incomplete and unverified and those pertaining to defendants Lane, Rosen, Scharf and Dapuzzo were unverified. By oral order of 9 November 1998, the court directed both groups of defendants to submit complete and verified net worth documentation by 2:00 p.m. on 10 November 1998.

Defendants Lane, Rosen, Scharf and Dapuzzo complied with the oral order of the court and submitted satisfactory documentation to plaintiff on 10 November 1998. On 16 November 1998, these defendants filed a written opposition to plaintiff's motion to compel of 9 November 1998. In this document, counsel for these defendants assert that any failure of these defendants to provide adequate net worth information to plaintiff in a

timely manner was in good faith and not an attempt to dodge the request or any court order pertaining thereto. Specifically, counsel state that as soon as they learned of Judge Leonard's 22 October 1998 order, they called their clients and instructed them to prepare net worth statements. They claim that the "outstanding document request accompanying the request for a net worth statement was simply overlooked. Nothing more, nothing less." (Defs' Resp. to Mot. to Compel at 2.) Further, these defendants assert that plaintiff did not truly confer with them before making this motion pursuant to Fed. R. Civ. P. Rule 37 as required by the rule, and that if they had, counsel for these defendants would have recognized the oversight and such a conference would have obviated the need for this motion. See Fed. R. Civ. P. 37(a)(2)(A).

The court finds the excusable neglect argument of defendants Lane, Rosen, Scharf and Dapuzzo persuasive. This is especially so in light of the fact that these defendants complied with the oral order of this court on 10 November 1998. Further, although plaintiff's receipt of the verified information during the on-going trial was certainly not the preferred time, it did not prejudice plaintiff, as plaintiff was able to get the net worth evidence as to these defendants before the jury.[3] While the behavior of these defendants and counsel on this matter was not exemplary by any stretch, the court will not impose sanctions upon defendants Lane, Rosen, Scharf or Dapuzzo, or their counsel, for any activity related to the net worth discovery information.

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[3] The court notes that these defendants filed a motion for a protective order on 30 October 1998 rather than complying with Judge Leonard's order of 22 October 1998. The court does not view the filing of this motion relevant to this motion for sanctions. At the time the motion for protective order was filed, these defendants had several motions in limine before this court relating to punitive damages, the rulings on which could have affected the need to produce net worth information.

As to the Jacobs Group defendants, however, the situation is different. These defendants did not file a written response to the 9 November 1998 motion to compel. Further, as of 24 November 1998, the day before the jury returned its verdict, defendants Robert Jacobs, Elliot Jacobs, Mirwis, Born, Queller and Queller, Inc. had yet to fully comply with the oral order of the court requiring them to give plaintiff complete, verified documentation of net worth on 10 November 1998. In open court on 24 November 1998, plaintiff moved again for sanctions and contempt against these defendants for their continued failure to comply. As further support, the court received a letter dated 10 December 1998 from plaintiff's counsel indicating that, as of that date, these defendants still had not provided verified or sworn responses to the net worth discovery. It is obvious to the court that these defendants and their counsel ignored this court's oral order of 9 November 1998 and continue to do so. While plaintiff may not have made the requisite Rule 37 certification in its written motion for sanctions, or conferred with opposing counsel before filing the motion, the purpose of those requirements, which is to give the party who has failed to produce the requested material a final chance to do so without court intervention, certainly has been served. These defendants had numerous opportunities to produce the requested information and the fact that they still have not complied with the orders of this and the bankruptcy court cannot and will not go unpunished. The sanction of striking the answers of these defendants, while it may very well be appropriate, will likely be ineffective given the verdict of the jury. However, as the recitation of the history of this discovery dispute recounted above makes clear, these defendants deserve a severe sanction. They have blatantly refused to comply with an order of this court for in excess of four months, not even to mention their defiance of early orders on this issue. Further, the outstanding request might be easily complied with by the inclusion of a simple verification by the responding defendant.

Monetary sanctions will be imposed against these defendants. Plaintiff shall recover its reasonable fees and costs associated with its attempt to achieve meaningful responses to its discovery requests form Robert Jacobs, Elliot Jacobs, Mirwis, Born, Queller and Queller, Inc. from 2 November 1998 to the present. Within 20 days of the receipt of this order, plaintiff shall file with the court documentation of these fees and costs. Such documentation shall include specific time entries describing what work was done, when it was done, the amount of time spent on any one task, the name of the individual doing the work, the billing rate of that individual, and the year of bar admission for each attorney included in this documentation. These defendants shall respond, if they so desire, within 10 days of plaintiff's filing. There will be no reply. The court will issue a subsequent order including the amount of sanctions.[4]

F. Defendants Lane, Rosen, Scharf and Dapuzzo's Motion Pursuant to Rule 37

On 11 December 1998, defendants Lane, Rosen, Scharf and Dapuzzo filed a motion for expenses and costs pursuant to Fed. R. Civ. P. 37(c)(2) on the grounds that at trial they had to make proof of numerous Requests for Admissions denied by plaintiff. On 5 January 1999, these defendants filed their memorandum in support of this motion.[5] Plaintiff filed a memorandum in opposition on 22 January 1999. Defendants did not file a reply.

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[4] The court's decision to enter these sanctions also addresses plaintiff's motion made in open court on 24 November 1998 for sanctions and contempt.

[5] The court allowed these defendants additional time to brief post-trial motions. The filing of this memorandum was, therefore, timely.

Rule 37(c)(2) states as follows:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves he genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorneys' fees. The court shall make the order unless is finds that (A) the request was held objectionable pursuant to rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit has reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c)(2). These moving defendants assert seven categories of requests for admissions that they served upon plaintiff, and which plaintiff denied, that defendants claim they were required "to spend enormous amounts of time and energy to prove the truth of the admissions." (Defs.' Mem. in Supp. of Rule 37 Mot. at 6) The court will not separately address each category enumerated by defendant but instead will address defendants' general arguments.

First, the court notes that the language of the rule itself states that it is only applicable to allow the recovery of fees and costs where the party seeking the admission later *proves* the matter denied. The court questions whether these defendants did in fact prove the matters included in the request for admissions at issue. Contrary to the defendants'

assertions, the verdict of the jury does not make this issue clear. Assuming, but not deciding, that these defendants did prove the matters denied by plaintiff, the court will, nonetheless, deny the motion on the ground that it was reasonable for plaintiff to believe that it would prevail on the matters in the requests. See Fed. R. Civ. P. 37(c)(2).

At trial, plaintiff presented evidence on the issues addressed in each category of the admissions delineated by defendants. While these defendants did counter plaintiff's evidence with evidence and arguments of their own, it was reasonable for plaintiff to believe that it would prevail. The court specifically finds that plaintiff had reasonable grounds to believe that it might prevail at trial on the matters it denied in the request for admission. For that reason the motion of defendants Lane, Rosen, Scharf and Dapuzzo pursuant to Fed. R. Civ. P. 37(c)(2) defendants will be denied.

G. Jacobs Group Defendants' Motions for Judgment as a Matter of Law, for a New Trial and to Alter Judgment

On 11 December 1998, the Jacobs Group defendants filed motions for relief pursuant to Fed. R. Civ. P. 49, 50(b), 58 and 59(e) and memoranda in support thereof. Plaintiff responded to these motions on 31 December 1998, and defendants filed a reply on 25 January 1999. As grounds for their motions pursuant to Rules 49, 58 and 59(e), these defendants assert the jury verdict and the answers to verdict interrogatories are inconsistent and that the court should alter or amend the verdict to be consistent. Plaintiff responds that this motion is untimely as it was required to be made prior to the discharge of the jury.

The Fourth Circuit has written of Fed. R. Civ. P. 49(b) that "[i]nherent in [its] language is the imposition of an obligation upon trial counsel to object to any asserted inconsistencies in the response to jury interrogators prior to

the discharge of the jury." White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir.) cert. denied, 493 U.S. 964 (1989) (citing Fernandez v. Chardon, 681 F.2d 42, 58 (1st Cir. 1982); Merchant v. Ruhle, 740 F.2d 86, 89 (1st Cir. 1984)). In White the court of appeals affirmed the district court's denial of a Rule 49(b) motion because the moving party had failed to timely file an objection to the verdict when they did so a few hours after the jury was dismissed. Id. at 145. "Proper respect for the Rule mandates that the failure to bring any purported inconsistencies in the jury's verdict to the attention of the court prior to the release of the jury will constitute a waiver of a party's right to seek a new trial." Id. at 146.

In the case at bar, no party made any argument that any portion of the jury's verdict was inconsistent prior to the discharge of the jury. These defendants now assert, in a motion filed one week after the discharge of the jury, that the interrogatories and general verdict were inconsistent. Pursuant to the reasoning of White and the language of Fed. R. Civ. P. 49(b), this will be denied as untimely.

The Jacobs Group defendants also moved for judgment as a matter of law and a new trial under Fed. R. Civ. P. 50(b). As grounds for this motion, they reassert that this court is without subject matter jurisdiction as plaintiff's case is not "related to" any bankruptcy proceeding. They further argue that plaintiff's claim of civil contempt is baseless, or in the alternative, is barred by res judiciata. The issues surrounding plaintiff's civil contempt claim are addressed in another section of this order. Finally, defendant's maintain that there was insufficient evidence for any of plaintiff's claims to be submitted to the jury or to support the jury's verdict.

Plaintiff responds that these arguments state no new legal bases for the motion, but merely rehash those arguments previously made to, and rejected by, this and the bankruptcy court. Plaintiff also argues that these defendants have not properly made a motion for a new trial under Fed.

R. Civ. P. 59. In their reply, defendants state that they did make a motion for a new trial as authorized under Fed. R. Civ. P. 50(b) which is entitled "Renewing Motion for Judgment After Trial; Alternative Motion for New Trial." The language of Rule 50(b) does allow for a party renewing its motion for summary judgment as a matter of law to "alternatively request a new trial or join a motion for a new trial under Rule 59." Fed. R. Civ. P. 59(b) Although defendants' motion does not specifically invoke Rule 59 as a ground for a new trial, it does invoke the language of Rule 50(b) above and include the specific request that the court "order a new trial." (Defs' Mot. Pursuant to Rule 50(b) for Post-Trial Relief at 2.) Thus the court will entertain defendants' motion under Rules 50(b) and 59.

A motion pursuant to Fed. R. Civ. P. 50(b) is a renewal of a motion pursuant to Fed. R. Civ. P. 50(a) made at the close of evidence and the standards of review for both motions are the same. This standard requires that a Rule 50 motion be granted when there is no substantial evidence to support the jury's verdict. At the close of the presentation of evidence by all parties at trial, this court determined the evidence to be legally sufficient to submit plaintiff's claims to the jury. The court remains convinced that there was substantial evidence to support plaintiff's claims against the Jacobs Group defendants. For this reason, the Rule 50(b) motion will be denied.

There is no fixed standard for evaluating a motion for a new trial pursuant to Fed. R. Civ. P. 59, thereby giving the trial court wide discretion. City of Richmond v. Atlantic Co., 273 F.2d 902, 916 (4th Cir. 1960); Moore's Federal Practice, 3rd Ed. § 59-13. However, a district court should order a new trial only in the limited circumstance where a "miscarriage of justice would result if the verdict were to stand." Olefins Trading, Inc. v. Han Yang Chem Corp., 9 F.3d 282, 289 (3rd Cir. 1993). Such a limited circumstance is

not present here. There will not be a miscarriage of justice if the verdict of this jury is allowed to stand. Defendants' motion for a new trial will be denied.

These defendants also moved pursuant to Fed. R. Civ. P. 58 and 59(e). These motions will be denied, as there is no cause to alter or amend the judgment. Finally, these defendants in their post-trial motions again argued that this court does not have subject matter jurisdiction over this case. This court has already denied that motion and again states that it believes that there is a sufficient relationship between the bankruptcy code and the issues presented to the jury in this case to support subject matter jurisdiction.

H. Motions of Defendants Lane, Rosen, Sharf and Dapuzzo for Judgment as a Matter of Law

Like the Jacobs Group defendant, defendants Lane, Rosen, Scharf and Dapuzzo, have renewed their motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) and moved for a new trial pursuant to Fed. R. Civ. P. 59. The standards recited above apply to those motions. The court finds that there was sufficient evidence to support the verdict as to the Lane defendants and thus there will be no miscarriage of justice if the verdict of the jury is allowed to stand. Thus, the Lane defendants' motions pursuant to Fed. R. Civ. P. 50(b) and 59 will be denied.

These defendants asserted, for the first time during the course of this action, the application of the Noerr-Pennington Doctrine[6] as a bar to all plaintiff's claims against them. Broadly stated, this doctrine prohibits the imposition of liability, on any theory, for litigating a claim. See, e.g.,

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[6] The doctrine gets its name from two Supreme Court decisions: Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and UMW v. Pennington, 381 U.S. 657 (1965).

California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 510 (1972). There is a "sham" exception to this doctrine to which the United States Supreme Court recently discussed in Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993). The Court clarified the two elements of this exception by explaining that at the challenged lawsuit "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and that "only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." Id. at 60. Thus, these defendants' assert that plaintiff must first show that the December 1996 appeal was baseless before the defendants' motive becomes relevant. They argue that plaintiff has not shown that appeal to be objectively baseless and thus, the court should not and cannot examine the motives behind that appeal.

The court agrees completely with defendants' statement of the elements of the Noerr-Pennington doctrine and their discussion concerning the sham exception. However, the doctrine does not come into play in this case for the simple reason that the defendants waived their right to rely upon it. Noerr-Pennington immunity is an affirmative defense, North Carolina Electric Membership Corp. v. Carolina Power & Light Co., 666 F.2d 50, 52 (4th Cir. 1981), which must be pled pursuant to Fed. R. Civ. P. 8. Resolution Trust Corp. v. Southwest Development CO., 807 F. Supp. 375, 379 (E.D.N.C. 1992) aff'd in part, rev'd in part on other grounds, 14 F.3d 596 (4th Cir. 1993). An affirmative defense that is not raised in an answer is waived. Id.; Harris v. Secretary of U.S. Dept. of Veterans Affairs, 126 F.3d 339, 343, 345 (D.C. Cir. 1997).

Even assuming that these defendants did not waive Noerr-Pennington immunity by failing to plead it, the court finds that the sham exception applies to the facts of this case. In order for litigation to be a sham, it must be objectively baseless in a sense that no reasonable litigant could realistically expect to succeed on the merits. City of

Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991). Only if this first part is satisfied may a court examine the litigant's subjective motivation to determine if the baseless conduct was an "attempt to interfere directly with a competitor's business relationships, through the use of the litigation process - as opposed to the outcome of that process - as an anticompetitive weapon." Id. In examining the first part of the test, the court is convinced that plaintiff's evidence at trial established that the appeal was objectively baseless. Defendants attempt to rely upon the opinion of Steve Beaman as to the merits of the appeal. However, the re-direct examination of Mr. Beaman by plaintiff revealed that at the time the appeal was filed, he had not evaluated its merits. From the totality of the evidence, the court determines that the appeal at issue was objectively baseless.

Having made this determination, the subjective motivation of the defendants becomes relevant. On this issue, the plaintiff again produced sufficient evidence that the reason for the appeal was to prevent the designee of the Sonnenschine Group, New Horizon, from exercising its option under its contract with Tudor. In reviewing the second element of the sham exception, the Supreme Court distinguished between situations in which a defendant acted through litigation to achieve a specific governmental result from those where a defendant acted though litigation to injure or interfere with the business of another or merely to impose expense or delay, finding that the latter was impermissible. See, City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991). The evidence presented at trial was clear that these defendants were involved in a situation akin to the latter. The court finds that defendants' motivation was to hinder plaintiff's ability to exercise its option and that such conduct satisfies the second element required for the invocation of the sham exception to the Noerr-Pennington doctrine.

I. Plaintiff's Motion to Strike Supplemental Proffer of Evidence

On 10 February 1999, the Jacobs Group defendants filed a Supplemental Proffer of Evidence in Support of Defendants' Post-trial Motions (supplemental proffer). The supplemental proffe consisted of a two-page memorandum and the affidavits of two jurors to the effect that "it was the verdict of the jury that the limited partner defendants should be held only nominally liable in this case." (Supplemental Proffer ¶ 5.) On 18 February 1999, plaintiff moved to strike the supplemental proffer and for costs and fees related to the motion and field a combined memorandum in support. Plaintiff asserts that the supplemental proffer violates of Fed. R. Evid. 606(b) which governs the use of juror testimony to inquire into the validity of the verdict, and that even if the proffer is accepted by the court, it does not support the relief sought by defendants. The Jacobs Group defendants filed a response on 5 March 1999, stating that the jurors' affidavits were not offered to impeach the jury's verdict, but to demonstrate that the verdict reported to the court was not the actual verdict agreed upon by the jury. These defendants also moved for costs and fees associated with the filing of the response to the motion to strike. Plaintiff filed a reply on 12 March 1999 reasserting the inadmissibility of the affidavits and the argument that the affidavits do not support the relief sought.

Federal Rules of Evidence 606(b) governs the admissibility of the supplemental proffer. It states, in relevant part:

> a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or the to effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to gear upon any juror. Nor may a juror's affidavit of evidence of any statement made by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The policies behind this rule are the "freedom of deliberation, stability and finality of verdicts and protection of jurors against annoyance and embarrassment." (Advisory Committee Notes, Fed. R. Evid. 606.)

The content of the affidavits at issue speaks directly to the deliberative process. The affidavits, which are suspiciously similar, explain that the "jury was confused by the Court's instructions and the form and structure of the verdict sheet" and was "precluded from returning its verdict in relation to each individual defendant by the form and structure of the verdict sheet." (Lumsden Aff. ¶¶ 8, 7; Pyhser Aff. ¶ ¶ 8, 7.) These statements provide a view into the deliberative process in that they give the reader an idea of the way in which the jury evaluated the liability of each defendant. Such juror testimony is quite simply prohibited by the rule as written. Further, the statements clearly suggest that the jury was confused by the instructions and the relationship between them and the verdict form. Any evidence that the jury misunderstood the instructions is

prohibited by Rule 606(b). See Peterson v. Wilson, 141 F.3d 573, 578 (5th Cir. 1998) (reversing new trial granted on basis of ex parte, post-verdict discussion between judge and jury indicating jury disregarded instruction because information came directly from internal deliberations); Peveto v. Sears & Roebuck & Co., 807 F.2d 486 (5th Cir. 1987) (judgment not amended when only basis was jury testimony barred by Rule 606). Defendants' assertion that these affidavits do not reflect the mental processes of the jury is disingenuous and their attempt to distinguish the confusion surrounding the verdict form from any confusion surrounding the instructions is unavailing. Plaintiff's motion to strike will be allowed. All motions for fees and costs relating to the supplemental proffer will be denied.

III. CONCLUSION

For the reasons stated above, plaintiff's claim for civil contempt of court and plaintiff's motions for sanctions against the Jacobs Group defendants for filing the motion to dismiss for lack of subject matter jurisdiction; to strike and for sanctions against the Jacobs Group defendants relating to defendants' late filing of two motions in limine, renewed motion for summary judgment, amended trial memorandum and proposed jury instructions; for sanctions regarding the failure of defendants Lane, Rosen, Scharf and Dapuzzo to respond to interrogatories and requests for production as to net worth; and, for fees and costs relating to the supplemental proffer offered are DENIED. The motion of the Jacobs Group defendants for judgment as a matter of law, for a new trial and to alter or amend judgment are DENIED. The motions of defendants Lane, Rosen Scharf and Dapuzzo for judgment as a matter of law and for a new trial and for expenses and costs pursuant to Fed. R. Civ. P. 37 are DENIED. Plaintiff's motion to strike the supplemental proffer is ALLOWED, and that document and its attachments are hereby STRICKEN. Plaintiff's motion for

sanctions against the Jacobs Group defendants for failure to respond to discovery regarding net worth is ALLOWED as to defendants Robert Jacobs, Elliot Jacobs, Mirwis, Born, Queller and Queller, Inc. and plaintiff shall have and recover from these defendants its reasonable attorneys' fees related to that matter from 2 November 1998 to date. As stated above, plaintiff shall file an affidavit and supporting documentation in support of that amount within 20 days of the date of this order. These defendants shall have 10 days from the date of plaintiff's filing to respond. Plaintiff shall have and recover $22,292,102.70 from defendants with liability for this total amount apportioned as follows:

a) defendants Stanley Lane; Howard Rosen; David Queller, David Queller, Inc., Ira Born; Robert Jacobs; Elliott Jacobs; Alan Mirwis; E.J. Servicing, Inc.; E.J. Realty Management, Corp.; and, E.J. Property Consultants are jointly and severally liable in the amount of $14,861,401.80;

b) all defendants are jointly liable in the amount of $7,430,700.90.

This 19 July 1999.

\s\ W. Earl Britt
W. EARL BRITT
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: December 14, 2000

No. 00-1701

NEW HORIZON OF NY LLC,
Plaintiff-Appellee,

v.

ROBERT JACOBS; ELLIOT JACOBS;
ALLAN MIRWIS; E. J. SERVICING, INCORPORATED;
E. J. REALTY MANAGEMENT CORPORATION;
E. J. PROPERTY CONSULTANTS; DAVID QUELLER;
DAVID QUELLER, INCORPORATED; IRA BORN,
Defendants-Appellants,

and

ALAN JACOBS; STANLEY LANE, M.D.;
PETER DAPUZZO; CONSTANCE ROSEN,
Executrix of the Estate of Howard
Rosen, M.D.; RUTH SCHARF,
Defendants.

ENTERED: DECEMBER 14, 2000

ORDER

On November 28, 2000 we filed our order denying the petition for rehearing and rehearing en banc in the two cases which are the basis for the attorneys fees at issue in this case. Those cases are New Horizion of NY LLC v. Jacobs, et. al., No. 99-1996, above mentioned.

We have before us in this case the motion of Jacobs, et al., field June 16,2 000, to stay all proceedings in this case, the motion of New Horizon, filed June 26,2 000, to dismiss the appeal of Jacobs, et al. in this case, and the motion of Jacobs, et al., filed November 20, 2000, for summary reversal in this case.

It is accordingly ADJUDGED and ORDERED as follows:

1. The motion for summary reversal of Jacobs, et al., shall be, and the same hereby is, granted.

2. It is further ORDERED and ADJUDGED that the motion of Jacobs, et al., for a stay, and the motion of New Horizion of NY LLC to dismiss the appeal, shall be, and the same hereby are, dismissed without prejudice as moot.

With the concurrences of Judge Micahel and Judge Motz.

/s/H.E. Widener, Jr.
For the Court

NOTICE: THIS IS AN UNPUBLISHED OPINION

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

TUDOR ASSOCIATED, LTD., II, A Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway, Plaintiff - Appellant,

and

Joseph N. CALLAWAY, Trustee for Tudor Associates, Ltd., II, Plaintiff,

v.

AJ & AJ SERVICING, INCORPORATED, a New Jersey Corporation; E.J. Realty Management Corporation; a New Jersey Corporation; Roberts Jacobs; Garden National Properties, Incorporated, a New Jersey Corporation; Alan Jacobs, Defendants - Appellees.

TUDOR ASSOCIATES, LTD., II, a Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway, Plaintiff - Appellee,

and

Joseph N. CALLAWAY, Trustee for Tudor Associates, Ltd., II, Plaintiff,

v.

AJ & AJ SERVICING, INCORPORATED, a New Jersey Corporation; Robert Jacobs, Defendants - Appellants,

and

E.J. Realty Management Corporation, a New Jersey Corporation; Robert Jacobs; Garden National Properties, Incorporated, a New Jersey Corporation; Alan Jacobs, Defendants.

Nos. 93-2294-93-2326.

Sept. 20, 1994.
Argued June 7, 1994.
Decided Sept. 20, 1994.
Entered: September 20, 1994

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Franklin T. Dupree, Jr., Senior District Judge.

ARGUED: R. Stuart Huff, LAW OFFICES OF R. STUART HUFF, Coral Gables, Florida, for Appellant.

E.D. Gaskins, Jr. EVERETT, GASKINS, HANCOCK & STEVENS, Raleigh, North Carolina, for Appellees.

ON BRIEF: Mark L. Mallios, LAW OFFICES OF R. STUART HUFF, Coral Gables, Florida; Joseph N. Callaway, II, BATTLE, WINSLOW, SCOTT & WILEY, P.A., Rocky Mount, North Carolina; Irvin P. Breedlove, Jr., STUBBS, COLE, BREEDLOVE, PRENTIS & BIGGS, Durham, North Carolina, for Appellant.

Katherine A. O'Connor, Robert H. Gourley, Jr., EVERETT, GASKINGS, HANCOCK & STEVENS, Raleigh, North Carolina, for Appellees.

E.D.N.C.

AFFIRMED IN PART AND REVERSED IN PART.

Before ERVIN, Chief Judge, MICHAEL, Circuit Judge, and JACKSON, United States District Judge for the 6350 35 8
Eastern District of Virginia sitting by designation.

OPINION

ERVIN, Chief Judge:

**1 Tudor Associates, Ltd., II, ("Tudor") is a debtor in the United States Bankruptcy Court for the Eastern District of North Carolina. This suit arises out of the sale in 1979 of certain tudor assets in a transaction involving Executive Management Trustees, Inc. ("EMT") and AJ & AJ Servicing, Inc. ("AJ"). Tudor filed a suit against EMT and AJ in bankruptcy court in 1983, alleging that the transaction was fraudulent. The bankruptcy court entered judgment in favor of Tudor in 1988, granting Tudor a one-half interest in certain mortgages from the 1979 deal. The court found that AJ had acquired the other half interest in the mortgages as a bona fide purchaser. AJ was ordered by the court to pay the money due Tudor from its interest in the mortgages as AJ collected the monthly payments.

Dissatisfied with AJ's performance, Tudor filed its complaint in this diversity action on June 7, 1991 in the United States District Court for the Eastern District of North Carolina. Following an amendment to the complaint in September 1992, the claims against AJ include breach of fiduciary duty, breach of contract, unfair and deceptive trade practices, conversion, fraud on the court, and RICO. The district court granted summary judgment in favor of AJ on all claims as to any liability for acts occurring prior to the bankruptcy court decision of September 14, 1988. The court also granted summary judgment on the RICO and fraud on the court claims.

Following trial in June 1993, the jury returned a verdict for Tudor against AJ in the liability phase and found compensatory damages in the amount of $529,696.50 and punitive damages in the amount of $7 million. The district court granted judgment as a matter of law in favor of AJ on the claims for conversion, breach of fiduciary duty, unfair trade practices, and punitive damages. In sum, only the

breach of contract verdict and the compensatory damage award were allowed to stand. Tudor appeals the decision of the district court. For the reasons set forth below, we affirm in part and reverse in part.

I.

In 1979, Tudor was a debtor in bankruptcy. Its sole assets were four rental properties located in North Carolina. The bankruptcy court approved the sale of these properties to EMT. EMT then simultaneously deeded the properties to three limited partnerships. EMT financed its purchases from Tudor with wraparound mortgages totaling approximately $20 million. Under this arrangement, the wraparound mortgage becomes a junior mortgage and the mortgageholder (EMT) makes payments to the senior mortgageholders (those to whom Tudor had been paying on the original mortgages) from the payments it receives on the wraparound.

Through their wholly owned corporation, AJ & AJ Servicing, Inc., Alan Jacobs, an attorney, and Robert Jacobs, an accountant, formed the three limited partnerships and brought these buyers to the deal with EMT. Alan Jacobs negotiated a "finder's fee" to be paid by EMT to AJ. The fee agreement was set forth in a series of letters between EMT and AJ. As collateral security for the fee agreement, EMT assigned a one-half interest in the mortgages to AJ. AJ was appointed as servicing agent to collect the monthly mortgage payments due from the limited partnerships, to pay itself the amount due under the fee agreement and to remit the balance to EMT. The arrangement was scheduled to end in September 1999, apparently when the wraparound mortgages would be paid in full.

**2 In 1983, Tudor filed an action in bankruptcy court alleging that the 1979 sale was a fraud on Tudor and the bankruptcy court by EMT (through its main actor, George Osserman) and by Jacobs. Apparently, EMT was not

making the necessary payments to the senior mortgage holders. Tudor sought to have the properties returned to it free and clear of the EMT mortgages. On September 14, 1988, the bankruptcy court found fraud on the part of EMT, but found that AJ had properly acquired its interest in the mortgages. The court entered a verdict in favor of Tudor against EMT in the amount of $11.6 million with interest from 1979 and awarded Tudor an equitable lien on the one-half interest in the mortgages not assigned to AJ. The court ordered AJ to file an accounting of all mortgage payments collected, to pay any funds held on behalf on EMT to Tudor, and to make future monthly accountings of all monies collected and to pay Tudor its onehalf interest in the mortgages. When AJ failed to perform as required under the judgment, Tudor instituted this suit.

II.

The district court granted summary judgment as to all claims for any acts occurring prior to the date of the bankruptcy court's decision, September 14, 1988. It did so on the basis of res judicata, and the applicable statutes of limitations.

A.

The district court applied res judicata, holding that all claims between Tudor and AJ arising out of the 1979 transaction up to the date of the bankruptcy court's judgment were adjudicated in that action and cannot now be relitigated.

For res judicata to apply, there must be (1) a final judgment, (2) identity of the cause of action in the former and instant suits, and (3) identity of the parties or their privies in both suits. *Meekins v. United Transp. Union,* 946 F.2d 054, 1057 (4th Cir. 1991).

In the bankruptcy court case, Tudor claimed fraud on the court and sought to have the 1979 transaction set aside. It sought to have title to the properties returned to it free and clear of the EMT mortgages. Tudor claimed that AJ participated in the fraud by EMT, or at least had knowledge of EMT's fraudulent scheme. The bankruptcy court found that there had indeed been fraud on the part of EMT, but that AJ had secured its interest in the deal as a bona fide purchaser. Tudor was awarded EMT's interest in the mortgages and AJ was ordered to account for all past and future collections of mortgage payments and to remit to Tudor all funds owing to EMT.

In this action, Tudor claims that AJ has breached the duty imposed on it by the bankruptcy court. That duty required AJ to account not only for prospective amounts, but to disclose and account for payments collected since 1979. AJ's duty to Tudor with respect to payments from 1979 arose with the bankruptcy court's decision in 1988. Tudor could not have litigated AJ's liability for breach of that duty in the bankruptcy court action because the duty did not then exist. There is no identity of cause of action between the 1988 suit and the instant claims. Because the second prong of the res judicata test is not met, res judicata does not apply. The district court incorrectly applied res judicata to grant summary judgment as to claims of liability for any acts occurring before September 14, 1988.

B.

**3 The district court also ruled that certain of Tudor's claims were partially barred by the applicable statute of limitations. The reasoning for each claim was somewhat different.

For the breach of contract claim, the district court analogized AJ's conduct to a refusal to pay on a continuation or installment contract, applying the North Carolina rule that the cause of action accrues against each installment as it

becomes due. To determine the date prior to which no acts could be considered, the district court counted back three years from the date of the complaint and held that no actions prior to June 7, 1988 could be considered.

For the breach of fiduciary duty and conversion claims, the court determined that the causes of action accrued when Tudor made a demand for payments due, which AJ refused. The court determined that Tudor had made such a demand at the time of the pre-trial order issued in March 1987 by the bankruptcy court. The district court then found that it should count back three years from the date of the complaint and bar consideration of acts occurring prior to June 7, 1988. The court does not explain why, if the actions accrued in 1987 in its view, the actions would not be barred by a compliant filed more than three years later.

For the Unfair and Deceptive Trade Practices Act claim, the district court determined simply that the four-year limitations period prohibited consideration of all acts occurring prior to June 7, 1987 (four years before the filing of the complaint).

We find the court's reasoning as to each of these claims unconvincing. We hold that AJ had no duty to Tudor until that duty was imposed on it by the bankruptcy court in 1988. Furthermore, Tudor had no right to sue until this duty arose. A cause of action accrues, starting the limitations period, as soon as the right to institute and maintain a suit arises. *Pierson v. Buyher*, 409 S.E.2d 903, 905 (N.C. 1991). Until a party has a real and vested interest in the subject matter of a lawsuit, an action will not lie. *Id. at 906.* Tudor's causes of action therefore arose on September 14, 1988, and none were barred at the time it filed its complaint on June 7, 1991.

AJ's duty, imposed in 1988, relates back to 1979 when AJ began collecting payments under the mortgages. *Marbach v. Gnadl*, 219 N.E. 2d 572, 579 (Ill. App. 1966) (an equitable lien, though not judicially recognized until a judgment is rendered declaring its existence, relates back to

the time it was created by the conduct of the parties). The fact that the causes of action accrued in 1988 is no reason to prohibit consideration of acts occurring prior to that time. For example, in a standard breach of fiduciary duty claim, the cause of action arises when the plaintiff becomes aware of the breach. The statute of limitations begins running at that point. The jury may, and in fact must, consider the fiduciary's acts that occurred prior to the plaintiff's discovery of the misconduct. There is no basis for prohibiting consideration of events occurring prior to September 14, 1988. We reverse the district court's grant of summary judgment in favor of AJ partially barring Tudor's claims on the basis of statutes of limitations.

III.

**4 The district court granted summary judgment in favor of AJ on Tudor's RICO claim. Because, inexplicably, neither Tudor's complaint nor AJ's motion for summary judgment are included in the joint appendix, reviewing whether Tudor made sufficient allegations to support its RICO claim is very difficult. However, based on the nature of the conduct at issue, we hold that AJ's conduct does not support a RICO violation.

To prove a RICO violation, the plaintiff must show a pattern of racketeering activity. A pattern will be found where there is continuity of the predicate acts and a relationship of the acts indicating a common purpose. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). While there must be at least two predicate acts, something more than simply a specified number of acts is required to demonstrate a pattern. *Id.* at 238.

This court has held that the pattern requirement is meant "to prevent ordinary commercial fraud from being transformed into a federal RICO claim." *Id.* at 685. To determine if fraudulent scheme rises to the level of a RICO violation, the court must determine its scale, duration and

number of victims. *Id.* RICO is reserved for those schemes whose scope and persistence set them above the routine. *American Bankers Inc. Co. v. First Union Nat'l Bank*, 699 F. Supp. 1174, 1178 (E.D.N.C. 1988). *American Bankers* involved injury to a credit insurer resulting from a fraudulent corporate bond program. The defendants were various financial institutions and law firms that had structured and administered the program. The court found that the ongoing program constituted a "single scheme designed to inflict a single injury on a single victim and as such, ...lack[ed] the scope and dimension necessary to form a RICO pattern." *Id.*

While Tudor may have alleged multiple predicate racketeering acts, AJ's reprehensible fraudulent conduct amounted to a single scheme to defraud Tudor of money due under the mortgages. Despite the fact that the scheme lasted over ten years and involved millions of dollars, it nonetheless involved a single scheme to inflict a single injury on a single victim. As such, it does not rise to the level of conduct necessary to support a RICO recovery. The district court properly granted summary judgment.

IV.

The jury returned a verdict indicating that AJ had converted to its own use, from the revenues collected under the contract with EMT to which Tudor succeeded, money to which Tudor was entitled and had done so with gross, willful, reckless or wanton disregard for the rights of Tudor. The district court granted judgment as a matter of law in favor of AJ on this conversion claim, overturning the jury's verdict.

A grant of judgment as a matter of law is reviewed to determine whether the record as a whole, viewed in the light most favorable to the nonmoving party, presents substantial evidence opposed to the motion. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980). Judgment as a matter of law should not be granted unless the

evidence is so clear that reasonable people could reach no other conclusion than the one suggested by the moving party. *Persinger v. Norfolk & Western R. Co.*, 920 F. 2d 1185, 1189 (4th Cir. 1990).

**5 The district court gave three separate reasons for its grant of judgment as a matter of law on Tudor's conversion claim. First, the court determined that a separate tort must accompany a breach of contract before conversion can be found. The court based this finding on Florida and Maryland law. However, under the controlling North Carolina law, the tort of conversion is found where there has been the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights. " *Garvin v. Fayetteville*, 401 S.E. 2d 133, 134 (N.C.App. 1991). If a jury finds those elements, it can properly find conversion without any specific finding of a separate tort. There was substantial evidence that AJ's fraudulent conduct converted Tudor's property to its own benefit. The district court erred in granting judgment as a matter of law on this reasoning.

The district court next found that conversion could not lie because Tudor's claim was based on the bankruptcy court's judgment and a judgment is not capable of being converted. North Carolina law provides that a judgment is neither goods nor a chattel and that a judgment creditor has no property interest in the judgment sufficient to support an action for its conversion. *Cobb. v. Cornegay*, 28 N.C. 358, 359 (1846). The court in *Cobb* made it clear, however, that it was referring to the literal judgment in the case, the piece of paper on which the court's decision was recorded. The actual judgment was characterized as a public writing belonging to "the justice who gave it, as a public custodier, to be kept by him until drawn out of his hands by the regular requirements of the law. " *Id.* Tudor is not suing for the conversion of the document granting it an interest in the mortgages, but for the amounts due under its equitable lien.

Because those amounts can be converted, the district court's reasoning is inapposite.

The district court finally held that because Tudor has no more than an equitable lien on the mortgages, its interest is not sufficient and its conversion claim must fail. The court quotes *Am. Jur. 2d,* "Conversion" §80 and the cases cited therein for the proposition that a mere equitable interest in personal property will not support an action for conversion. That section, however, relates principally to the type of interest an intended beneficiary has in a life insurance policy; its interest is not fixed because it has no legal right of possession of the property. Tudor has more than a mere floating equitable interest in the mortgage proceeds; the bankruptcy court judgment established Tudor's interest and required AJ to pay the proceeds to Tudor. *Am.Jur.2d,* "Liens" §60 recognizes that a lienholder may sue for conversion of the property on which his lien exists if it is wrongfully disposed of by the owner. The district court erred in determining that Tudor did not have an interest in the mortgages sufficient to support conversion. We reverse the district court's grant of judgment as a matter of law on Tudor's conversion claim. The jury's verdict will stand.

V.

**6 The district court granted judgment as a matter of law in favor of AJ on Tudor's Unfair and Deceptive Trade Practices Act claim, reversing the jury's verdict. As recognized by the district court, the jury found that AJ engaged in unlawful practices by concealing from plaintiff revenues collected in servicing the wrap around mortgages to which plaintiff was entitled by depositing such revenues in various bank accounts unknown to plaintiff; that it filed false and deceptive reports with the bankruptcy court; that it misrepresented to plaintiff his rights to revenues collected: that it misled or deceived plaintiff as to the application of revenues collected; that it concealed from plaintiff the

identity and ownership of the persons and corporations to whom management fees were being paid; that it falsely represented to the plaintiff that expenses for attorney's and accounting fees were related to the operation of the properties; that it falsely represented to the plaintiff that additional management fees had been approved by the property owners; that these acts were committed by AJ in commerce; and that the acts were the proximate cause of damage to the plaintiff.

J.A. 182-83. The district court then noted that nothing else appearing, these findings would seem to constitute unfair and deceptive trade practices under the Fair Trade Act and would justify a ruling by the court under North Carolina law that plaintiff is entitled to recover treble damages.

J.A. 183. The district court then held that judgment as a matter of law was appropriate nonetheless because under North Carolina law, a simple breach of contract does not constitute an unfair trade practice. North Carolina law also provides, however, that when accompanied by aggravating circumstances, a breach of contract may violate the Act. *Garlock v. Henson*, 435 S.E. 2d 114, 115 (N.C. App. 1993). To find such aggravating factors, the plaintiff must demonstrate deception in the formation of the contract or in the circumstances of its breach. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989). It is difficult to imagine a more clear finding by the jury of substantial aggravating factors. Although the ultimate decision of whether conduct constitutes an unfair trade practice is left to the court, *id.* at 534, the district court abused its discretion in not so finding here.

The district court offered two other reasons to render judgment as a matter of law on this claim. The first alternative basis is that because the court admitted evidence of acts committed by AJ prior to 1988 but instructed the jury not to consider it in determining liability, the jury must have been confused by the instruction and improperly considered

the pre-1988 conduct. There is no basis in the record for this determination by the court. Substantial evidence supports the jury's verdict. Furthermore, the pre-1988 acts should not have been removed from the jury's consideration in the first place. See Section II, *supra.*

**7 The court's second alternative basis for its action on the unfair trade claim was that Tudor had "access to adequate information to enable [it] to ascertain the status of [its] claims against defendants at all times." J.A. 186. presumably, the district court is here referring to the requirement that recovery under the Act is limited to those situations where the plaintiff can show that the plaintiff detrimentally relied on defendant's statement or misrepresentation and suffered actual injury as the proximate result. *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. App. 1990), *review denied,* 402 S.E. 2d 824 (N.C. App. 1990).

The fact that Tudor was aware that AJ was involved in deceptive acts relating to its servicing of the mortgages does not preclude a finding that Tudor nonetheless relied on AJ to remit payments due. Tudor necessarily relied on AJ to perform as required; that Tudor knew of AJ's deception does not make it any less deceptive or unfair. We reverse the district court's grant of judgment as a matter of law on the unfair and deceptive trade practices claim. The jury's verdict will stand.

VI.

The jury returned a verdict finding that AJ owed a fiduciary duty to Tudor by virtue of its role as servicing agent and that AJ breached that duty. The district court found that "these findings are contrary to the weight of the evidence and the applicable law, and they will be set aside." J.A. 181. The district court used the wrong standard in granting judgment as a matter of law on this claim. Judgment as a matter of law shall be granted only if there is

no substantial evidence to support the verdict. *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107 (4th Cir. 1991). The trial court used the standard that would permit it to grant a new trial, i.e., that the verdict was against the great weight of the evidence. *Id.* Because there is substantial evidence in the record that AJ owed a fiduciary duty to Tudor, the jury's verdict will stand.

The district court also found that there could be no fiduciary duty in this case because there existed no relationship between Tudor and AJ of special faith, confidence and trust. J.A. 181. The court found that because AJ and Tudor were constantly at odds with each other and because Tudor clearly didn't trust AJ. there could be no fiduciary relationship. The court erred in making this finding.

North Carolina provides that a fiduciary relationship "exists in all cases where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith." *Curl v. Key*, 316 S.E. 2d 272, 275 (N.C. 1984). The duty arises in certain legal relationships, including that of principal and agent, where the agent is charged with the entire management of the principal's affairs. *McNeill v. McNeill*, 25 S.E. 2d 615, 617 (N.C. 1943). The fact that a debtor may not trust his trustee or a child may not trust her guardian ad litem does not destroy the fiduciary's obligation to act in the best interests of its charge. The fiduciary responsibility arises from the special position the fiduciary is in.

**8 AJ is in the special position of managing Tudor's one half interest in mortgages worth over $20 million. AJ has been ordered by the court to account for and service the mortgages on Tudor's behalf. There was substantial evidence that AJ is required in equity and good conscience to act in good faith. The district court erred in overturning the jury verdict for Tudor on its breach of fiduciary duty claim.

VII.

The district court denied Tudor's motion for leave to amend its complaint to assert the illegality of the finder's fee. The denial of leave to amend must be based on a showing of prejudice, bad faith, futility or dilatoriness associated with the motion. *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital System, Inc.*, 853 F.2d 1139, 1148 (4th Cir. 1988).

Tudor's argument alleges that the fee agreement underlying AJ's interest in the mortgages is invalid and that AJ's interest therefore invalid. The district court denied leave to amend on the basis of futility. Because the bankruptcy court had already determined in a proceeding involving both Tudor and AJ that AJ acquired its interest in the mortgages as a bona fide purchaser, that issue cannot be relitigated. The identical issue was necessarily determined in a prior action in which the parties were identical to, or in privity with, the parties in the instant action. The issue is therefore collaterally estopped from relitigation. *State v. O'Rourke*, 442 S.E.2d 137, 138 (N.C. App. 1994). The district court properly denied leave to amend the complaint.

VIII.

Tudor argues that its lien granted by the bankruptcy court is a superior lien to AJ's rights under the fee agreement with EMT. Tudor argues that the district court incorrectly denied summary judgment on its motion for declaratory judgment that AJ is limited to one-half of the proceeds from the mortgage payments.

The fee agreement provides that in some years, AJ is entitled to more than half of the mortgage proceeds. As security for the fee agreement, EMT assigned one-half interest in the mortgages to AJ. AJ's interest in the mortgages secures its right to *all* the fees due under the fee agreement. Because its security interest in one-half of the

mortgages does not limit its right to the proceeds to one half; AJ has a right to whatever is due under the fee agreement. Tudor, as successor to EMT, is entitled to the revenues owing EMT on the basis of its one-half interest in the mortgages. In effect, Tudor is bound by the fee agreement between AJ and EMT. The district court committed no error in this regard.

IX.

In the damages phase of the trial, the jury returned a verdict awarding Tudor punitive damages in the amount of $7 million. The district court vacated that award as unconstitutional and alternatively, should that ruling be overturned on appeal, ordered a new trial on punitive damages.

The Supreme Court has made it clear that the jury may not be given unbridled discretion in determining punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Post-judgment review by the trial court may, however, protect a jury award. *Id.* at 22. Interpreting *Haslip*, this court has determined that to protect the constitutionality of a punitive damages award, four so-called *Haslip* factors must be taken into consideration: (1) the relationship of the damages to the harm caused, (2) other penalties for the same conduct, (3) improper profits and plaintiff's costs, and (4) limitations based on defendant's ability to pay. *Mattison*, 947 F.2d at 110. While these issues may be considered by the trial court in a post-trial review in state court proceedings, they must be presented to the jury for prejudgment consideration in federal proceedings. *Id.* at 109.

**9 In *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992), this court determined that a district court, sitting in a state in which the highest court has not yet ruled on its punitive damage procedure in light of the U.S. Supreme Court's pronouncement in *Haslip*, should predict

what the state court would do to ensure the constitutionality of its state scheme. In *Hugo's Skateway*, the district court determined that the state would require consideration of the *Haslip* factors, and therefore required that the factors be included in the jury charge in the federal proceeding.

In the case at bar, Tudor requested the *Haslip* instruction be given to the jury. North Carolina's Supreme Court had not yet ruled on the correct procedure and so the district court was bound by *Hugo's Skateway* to predict what North Carolina courts would do in light of *Haslip*. The determination would have been well-informed by the fact that North Carolina's judicial conference had already published a new jury instruction on punitive damages incorporating the *Haslip* criteria. N.C. Pattern Instruction 810.01. Tudor requested this instruction. AJ objected to its use, arguing that there was no basis in North Carolina law for using the new instruction. The district court agreed with AJ and refused to give the instruction. Upon the jury's award of $7 million, the court determined that the jury had been improperly instructed and that the award was therefore unconstitutional.

The conduct of the defense in this case presents a clear example of invited error. It is "a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party." *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 (11th Cir. 1985). AJ cannot argue against the proper instruction at trial and then argue to set aside the award because the proper instruction was not given.

The district court found that alternatively, a new trial should be given on the issue of punitive damages because the award was so grossly excessive as to shock the conscience. In making that determination, the court was required to balance competing interests to determine that a new trial was necessary to avoid a miscarriage of justice. *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985).

The district court's grant of a new trial is reviewed for abuse of discretion. *Mattison*, 947 F.2d at 108.

The district court ruled

> that having been found guilty of conduct warranting the assessment of punitive damages against it by a competent tribunal, a defendant should not thereafter be liable for punitive damages in another action involving the same conduct.
>
> Finally, there is a feature of the punitive damages procedure which, if it does not render it constitutionally suspect, at least serves to make it morally wrong, and that is the fact that the proceeds of a punitive damages award go not into the public coffers as do all other fines and forfeitures but into the pockets of the successful plaintiff and his attorney.
>
> **10****
>
> This court, of course, will continue to apply the law as best it can be discerned for the sometimes bewildering decisions currently covering the punitive damages field. Were it writing on a clean slate it would have no hesitance in ruling unconstitutional the award of punitive damages in the present case and would simply enter judgment for the defendants on this issue. Instead, the court must state that the award of $7,000,000.00 as punitive damages in this case was shocking to the court's conscience, and in the event the court's ruling on the conversion count is reversed on appeal it must be set aside as grossly excessive and contrary to the weight of the evidence.

J.A. 199, 201. The trial court's admitted prejudice against punitive damages for *any* private plaintiff makes it unlikely that the court actually weighed competing interests to determine that a new trial was necessary to avoid a miscarriage of justice. We find that the district court abused its discretion in ordering a new trial. The punitive damages award will stand.

X.

For the reasons set forth above, we hold as follows:

> (1) we reverse the district court's grant of summary judgment as to all claims for any acts occurring prior to the date of the bankruptcy court's decision, September 14, 1988; (2) we affirm the district court's grant of summary judgment in favor of AJ on Tudor's RICO claim; (3) we reverse the district court's grant of judgment as a matter of law in favor of AJ on the conversion claim, the Unfair and Deceptive Trade Practices Act claim, and the breach of fiduciary duty claim; (4) we affirm the district court's denial of Tudor's motion for leave to amend its complaint to assert the illegality of the finder's fee and its motion for declaratory judgment that AJ is limited to one-half of the proceeds from the mortgage payments; and (5) we reinstate the jury's punitive damage award of $7 million in favor of Tudor.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 28, 2000

No. 99-1990
CA-97-126-5-BR

NEW HORIZON OF NY LLC,
Plaintiff-Appellee,

v.

ROBERT JACOBS; ELLIOT JACOBS;
ALLAN MIRWIS; E. J. SERVICING, INCORPORATED;
E. J. REALTY MANAGEMENT CORPORATION;
E. J. PROPERTY CONSULTANTS; DAVID QUELLER;
DAVID QUELLER, INCORPORATED; IRA BORN,
Defendants-Appellants,

and

ALAN JACOBS; STANLEY LANE, M.D.;
PETER DAPUZZO; CONSTANCE ROSEN,
Executrix of the Estate of Howard
Rosen, M.D.; RUTH SCHARF,
Defendants.

No. 99-1996

NEW HORIZON OF NY LLC,
Plaintiff-Appellee,

v.

STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of Howard Rosen, M.D.; RUTH SCHARF,
Defendants-Appellants,

and

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E. J. SERVICING, INCORPORATED; E. J. REALTY MANAGEMENT CORPORATION; E. J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INCORPORATED; IRA BORN; ALAN JACOBS,
Defendants.

On Petition for Rehearing and Rehearing En Banc

ENTERED: NOVEMBER 28, 2000

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/Patricia S. Connor
Clerk

Section 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

Section 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain

from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C.A. §1367

Section 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -

(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original juris-diction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circum-stances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Added Pub. L. 101-650, Title III, §310(a), Dec.1, 1990, 104 Stat. 5113.

CHAPTER 75.

MONOPOLIES, TRUSTS AND CONSUMER PROTECTION.

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

Added by Laws 1969, c. 833. Amended by Laws 1977, c. 747, §§. 1, 2.